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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STANLEY BOIM, individually and as administrator of the ESTATE OF DAVID BOIM, deceased, and JOYCE BOIM,
Petitioners,

v.

MUHAMMAD ABDUL HAMID KHALIL SALAH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in the *Central Bank of Denver* case bars victims of international terrorism from recovering damages against aiders and abettors of terrorist acts.

LIST OF PARTIES

Petitioners in this Court (plaintiffs-appellees below) are Stanley Boim and Joyce Boim;

Respondent in this Court (a defendant-appellant below) is Muhammad Abdul Hamid Khalil Salah;

Additional defendants-appellants below who are not parties in this Court are Holy Land Foundation for Relief and Development, American Muslim Society d/b/a Islamic Association of Palestine-National, and Quranic Literacy Institute.

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IN THE

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No. 08- ___

STANLEY BOIM, INDIVUALLY AND AS ADMINSTRATOR OF THE ESTATE OF DAVID BOIM, DECEASED, AND JOYCE BOIM,

Petitioners,

v.

MUHAMMAD ABDUL HAMID KHALIL SALAH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals (Pet. App. A, pp. 1a-90a, *infra*) are reported at 549 F.3d 685. The vacated decision of a panel of the court of appeals appears at 511 F.3d 707. The decision of the district court granting summary judgment on liability is reported at 340 F. Supp. 2d 885. The decision of the court of appeals affirming the denial of motions to dismiss (Pet. App.

B, pp. 91a-157a, *infra*) is reported at 291 F.3d 1000. The decision of the district court denying motions to dismiss is reported at 127 F. Supp. 2d 164.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on December 3, 2008. On February 19, 2009, Justice Stevens granted an extension of time within which the petitioners could file a petition for certiorari to and including May 2, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2333(a) provides as follows:

§ 2333. Civil remedies

(a) Action and jurisdiction. Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

STATEMENT

1. The Murder of David Boim

On May 13, 1996, 17-year-old American-born David Boim was shot and killed in a drive-by shooting by Hamas terrorists Amjad Hinawi and Khalil Tawfiq Al-Sharif while Boim was waiting at a bus stop in the West Bank. In September 1997 Al-Sharif died as a suicide bomber in the heart of Jerusalem, killing five civilians and injuring 192. Hinawi was tried and convicted in February 1998 in a Palestinian court of participating in the killing of David Boim. According to a report of the trial by a United States State Department employee, Hinawi confessed to driving the car from which Al-Sharif fired shots at a bus and individuals at the bus-stop. Hinawi served little time in prison and died in a shoot-out in Nablus in November 2005.

2. Hamas' Role in the Murder

The District Court found that there was "ample evidence showing that Hamas did, in fact, take responsibility for the attack that killed David Boim." *Boim v. Quranic Literacy Institute*, 340 F. Supp. 2d 885, 899 (N.D. Ill. 2004). After summarizing evidence in the record, the District Court said, in a finding affirmed by the majority of the *en banc* court below: "In short, all of the evidence in the record on this issue points to Hamas as the entity responsible for David's murder. Even now, HLF has offered no evidence that anyone other than Hamas was responsible for the attack. Accordingly, the Court

finds that David Boim was murdered by Hamas activists, in a Hamas-sponsored attack, and that no reasonable jury could find otherwise." 340 F. Supp. 2d at 899. The *en banc* majority agreed that "the defendants presented no evidence that the killing of Boim was *not* a Hamas hit." 549 F.3d at 704, p. 41a, *infra* (emphasis original).

3. Respondent Salah's Role

Muhammad Salah (under the name Abu Ahmad) was the admitted U.S.-based leader of Hamas' military wing. *Matter of Extradition of Marzook*, 924 F. Supp. 565, 587 (S.D.N.Y. 1996). On January 25, 1993, Salah was arrested in Israel while on a Hamas mission, directed by Mousa Abu Marzook, the deputy chairman of Hamas' political bureau, to reorganize and re-staff Hamas cells and to distribute nearly $800,000 to Hamas operatives. While in an Israeli prison, Salah handwrote a detailed statement describing his activities on behalf of Hamas in the United States, and portions of that statement are quoted in the *Marzook* opinion. 924 F. Supp. at 587-591. Salah described how he had trained terrorists, funneled funds to Hamas, and directed the rebuilding of the Hamas infrastructure and command. Many details of Salah's confession were corroborated by other evidence, including records of hundreds of thousands of dollars transferred from Marzook to Salah before Salah's trip to Israel.

Salah pleaded guilty in an Israeli military court to belonging to Hamas and illegally channeling funds to Hamas. He was sentenced to five years'

imprisonment and incarcerated in Israel until November 1997. *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 795 (N.D. Ill. 1999).

Salah invoked his Fifth Amendment privilege against self-incrimination and refused to answer any substantive questions in his deposition in this case. He was convicted in the United States District Court for the Northern District of Illinois of obstruction of justice for responding falsely to interrogatories served on him by the petitioners in this case and was sentenced to imprisonment for 21 months. *United States v. Salah*, N.D. Ill. No. 03-CR-978.

4. History of This Litigation

Petitioners are David Boim's parents. They filed a complaint claiming treble damages and attorneys' fees under 18 U.S.C. § 2333 against Hinawi, the estate of Al-Sharif, a number of organizations, including the Holy Land Foundation and the American Muslim Society, that supported and financed Hamas, and respondent Salah. The defendants moved to dismiss the complaint on the ground, *inter alia*, that Section 2333 does not expressly authorize civil actions against aiders-and-abettors and that *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), bars actions against aiders-and-abettors unless the applicable federal statute specifies aider-and-abettor liability. The district court denied the motion to dismiss. *Boim v. Quranic Literacy Institute*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001). An interlocutory appeal to the Court of Appeals for the

Seventh Circuit was authorized, and, after 9/11, the panel requested participation by the United States. The government supported petitioners' position that there was aider-and-abettor liability under Section 2333, and the court of appeals affirmed. *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002). Pet. App. B, pp. 91a-157a, *infra*.

Following discovery, the district court granted summary judgment on liability against Salah, the Holy Land Foundation, and the American Muslim Society. *Boim v. Holy Land Foundation*, 340 F. Supp. 2d 885 (N.D. Ill. 2004). The case then proceeded to a jury trial, during which the petitioners and a survivor of the shooting testified. The jury returned a verdict against the Quranic Literacy Institute and awarded damages in the amount of $52 million. That amount was trebled and the final judgment for $156 million was entered against Salah and the three organizations.

The defendants appealed from the final judgment, and argument was heard on November 30, 2005. More than two years later, on December 28, 2007, a divided panel of the Seventh Circuit reversed the judgment with a majority opinion that held, *inter alia*, that the petitioners had failed adequately to prove causation in fact. *Boim v. Holy Land Foundation*, 511 F.3d 707 (7th Cir. 2007). Judge Evans dissented.

The court of appeals thereafter granted rehearing *en banc*. In a 7-to-3 decision, with an opinion by former Chief Judge Posner, the majority affirmed

the judgment against the American Muslim Society and the Quranic Literacy Institute. It remanded the case with respect to the Holy Land Foundation on the ground that the district court had erred in granting summary judgment against that organization.

The majority opinion revisited the issue of aider-and-abettor liability even though it had not been raised by any appellant on the appeal from the final judgment or in any of the supplemental briefs filed for the *en banc* court. Writing for the majority, Judge Posner held, in reliance on this Court's opinion in the *Central Bank of Denver* case, that "statutory silence on the subject of secondary liability means there is none." Pet. App. A, p.5a, *infra*. The majority opinion held that donors to terrorist organizations could be held *primarily* liable under Section 2333 by "a chain of explicit statutory incorporations by reference." Pet. App. A, p. 7a, *infra*. Section 2333(a) incorporates the definition of international terrorism in Section 2333(1) which, in turn, refers to "acts dangerous to human life that are a violation of the criminal laws of the United States" thereby incorporating Section 2339A(a) that includes a killing covered by Section 2332. On this basis, the majority of the *en banc* court of appeals found that organizations that had donated to Hamas could be held primarily liable for the murder of David Boim committed on May 13, 1996.

With regard to respondent Salah, however, the majority held that since 2339A was effective on September 13, 1994 – after Salah was imprisoned in

Israel – he engaged in no primary conduct after the effective date of the law that could render him primarily liable. Hence the *en banc* majority directed that the judgment against Salah be reversed with instructions to enter judgment in his favor. Pet. App. A, p. 41a, *infra*.

Circuit Judges Rovner and Williams, dissenting from the majority opinion, stated that when Congress enacted Section 2333 it "subjected to civil liability not only those who engage in terrorism but also those who aid or abet terrorism." Pet. App. A, p. 48a, *infra*. They said: "The secondary liability framework is a much more natural fit for what the defendants here are alleged to have done and . . . the elements of aiding and abetting serve a useful function in distinguishing between those who intend to aid terrorism and those who do not." *Id.* Circuit Judge Wood also dissented in an opinion joined by Judges Rovner and Williams "except with respect to Salah's liability." Pet. App. A., p. 74a, n. 1, *infra*. She stated her view that Section 2333 "does impose secondary liability on those who aid and abet acts of terrorism." Pet. App. A, p. 77a, *infra*.

REASONS FOR GRANTING THE WRIT

Although the decision of the seven-member majority of the *en banc* Seventh Circuit held that the three institutional defendants could be held liable under Section 2333, it reversed and vacated an important portion of the district court's final judgment by its finding that respondent Salah could not be held liable as a principal tortfeasor because he

was "arrested by Israeli authorities in 1993 and not released until 1997." Pet. App. A, p. 10a, *infra*. The record contains ample evidence that Salah had aided and abetted Hamas before his 1993 arrest, but the majority opinion below held that he could not be liable as a principal because he was in an Israeli prison at the time Section 2339A was enacted.

Approximately 1.4 million dollars in bank accounts and safe deposit boxes held in respondent Salah's name had been seized in June 1998, as property that is forfeitable under 18 U.S.C. § 981. An FBI Agent's affidavit described these funds as "moneys transferred, or traceable to moneys transferred from outside the United States, into the United States, with the intent of supporting HAMAS in the commission of specified unlawful activity, involving extortion, kidnapping and murder of and against the citizens and government of the State of Israel, in furtherance of HAMAS' publicly declared goals of undermining the Israeli-Palestinian peace process and forcing the State and citizens of Israel to cede physical and political control and dominion over the lands comprising Israel and the occupied territories."

Petitioners would be able to satisfy their judgment from these funds if respondent Salah were held liable under 18 U.S.C. § 2333 as an aider and abettor. Reversal of the judgment against Salah on the ground that aiders and abettors are not liable under 18 U.S.C. § 2333 eliminates recourse to the funds seized from Salah for collection of petitioners' judgment. Since there are few resources to which petitioners can turn to execute on their judgments

and recover compensatory damages and attorneys' fees, the validity of the judgment against Salah is of great importance in realizing the remedy that Congress provided in Section 2333.

I.

THE COURT OF APPEALS' RULING MISAPPLIES THIS COURT'S DECISION IN THE *CENTRAL BANK OF DENVER* CASE

This Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), did not, as the majority below suggested, extinguish the civil liability of aiders and abettors to crimes of violence for which there is a statutory remedy that does not specify aider-and-abettor liability. Indeed, with regard to 18 U.S.C. § 2333, the statutory language, as well as the Congressional purpose demonstrated by the law's legislative history, was to impose civil liability on individuals or organizations in the United States that satisfied the traditional common-law aiding-and-abetting legal criteria, including those that finance organizations engaged in international terror.

The *Central Bank of Denver* case concerned a civil remedy that was implied from Section 10(b) of the Securities and Exchange Act of 1934, and this Court held that liability for aiding and abetting the principal violator – whose own liability was not explicitly prescribed in the federal statute – could not be inferred. Wholly different considerations

govern when the principal statutory violation is not only explicitly defined by the federal statute but also consists of conduct that is *malum in se* such as the terrorist shooting that killed David Boim.

In its initial review of the legal theory underlying the petitioners' claim, the Seventh Circuit panel rejected the defense "that *Central Bank* eliminates all aiding and abetting liability in federal civil cases except when the words 'aid and abet' appear in a statute." *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1019 (7th Cir. 2002), Pet. App. B, p. 135a, *infra*. The panel summarized the distinctions between secondary liability for acts of terrorism and secondary liability for deception in connection with the purchase or sale of securities as follows (*Id.*):

> The *Central Bank* analysis provides guidance but is not determinative here for a number of reasons. First, *Central Bank* addressed extending aiding and abetting liability to an implied right of action, not an express right of action as we have here in section 2333. Second, Congress expressed an intent in the terms and history of section 2333 to import general tort law principles, and those principles include aiding and abetting liability. Third, Congress expressed an intent in section 2333 to render civil liability at least as extensive as criminal liability in the context of the terrorism cases, and criminal liability attaches to aiders and abettors of terrorism. *See* 18 U.S.C. § 2. Fourth, failing to extend section 2333 liability to aiders and

> abettors is contrary to Congress' stated purpose of cutting off the flow of money to terrorists at every point along the chain of causation.

Following the jury trial that resulted in a judgment in petitioners' favor, the same Seventh Circuit panel adhered to its earlier ruling regarding the inapplicability of this Court's *Central Bank* decision. See 511 F.3d at 738 Indeed, respondent Salah did not even cite the *Central Bank* decision in his principal brief, and it was cited only in a footnote, on a peripheral point, in his Reply Brief.

The majority opinion below noted that the supplemental briefs filed after rehearing *en banc* was granted did not "revisit" the issue of the applicability of the *Central Bank* decision "and at oral argument counsel for Salah and the Holy Land Foundation disclaimed reliance on their former position concerning the liability of donors." Pet. App. A, p. 3a, *infra.* Nonetheless, the majority of the *en banc* Seventh Circuit determined that *Central Bank* foreclosed aider-and-abettor liability under 18 U.S.C. § 2333, and thereby shielded respondent Salah's substantial assets from execution.

This conclusion conflicts with the explicit language of Section 2333. Subsection (1)(A) of Section 2333 defines "international terrorism" as including "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State." The "criminal laws of the United States" are violated, under 18 U.S.C. § 2, by any person who

"aids, abets, counsels, commands, induces or procures" a felony that violates the Federal Criminal Code. Hence an aider and abettor to murder is, by the explicit terms of Section 2333, a person who has committed an "act of international terrorism" and may be held liable "in any appropriate district court of the United States" to a "national of the United States injured in his or her person, property, or business."

Moreover, the legislative history of Section 2333 establishes that the Congress that enacted the law in 1990 (Pub. Law No. 101-519; 104 Stat. 2250 (1990)) and re-enacted it in the Antiterrorism Act of 1992 (Pub. Law No. 102-572, 106 Stat. 4506 (1992)) intended to "bring all of the substantive law of the American tort law system" into play, including principles of vicarious liability. *Antiterrorism Act of 1990*, Hearing before the Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary, 101st Cong., 2d Sess., pp. 83, 136. The 1992 Senate Report stated that the law would impose "liability at any point along the causal chain of terrorism" and would "interrupt, or at least imperil, the flow of money." S. Rep. No. 102-342 (1992), p. 22.

II.

THERE IS A CONFLICT AMONG FEDERAL COURTS OVER WHETHER THIS COURT'S *CENTRAL BANK OF DENVER* DECISION APPLIES TO ALL INSTANCES OF AIDING-AND-ABETTING LIABILITY

Various federal courts followed and applied the 2002 decision of the Seventh Circuit panel that held that the *Central Bank of Denver* principle did not apply to Section 2333 liability or to other comparable situations. *E.g., Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282-283, 288, 317-318 (2d Cir. 2007); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1172-1174 (C.D. Cal. 2005),. Others have refused to impose aider-and-abettor liability in the absence of an explicit statutory authorization. *E.g., Freeman v. DirectTV, Inc.*, 457 F.3d 1001 (9th Cir. 2006); *City of New York v. Attea*, E.D.N.Y. No. 06-CV-3620 (CBA), 2009 WL 701005 (March 11, 2009). Whether the *Central Bank of Denver* rationale should be applied to other comparable federal statutes is a question that warrants this Court's attention. The current uncertain status leads to inconsistent results in different federal circuits and in district courts. *See* Nilay Vora, "Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability," 50 Havr. Int'l L.L. 195, 217-220 (2009).

In *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), a unanimous panel of the District of Columbia Circuit (Circuit Judges Wald, Bork, and Scalia) held that the common law prescribed civil liability against aiders and abettors of a murder. The *Halberstam* opinion was described by this Court in its *Central Bank of Denver* decision as "a comprehensive opinion on the subject." 511 U.S. at 181. There was, of course, no explicit statute in *Halberstam* that authorized victims of a murder to recover damages against an individual who had aided and abetted the murder. Nonetheless, the court of appeals unanimously affirmed a damage award. The continued viability and applicability of the principle articulated in *Halberstam v. Welch* is presented by this case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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May 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 05-1815, 05-1816, 05-1821, 05-1822

STANLEY BOIM, individually and as administrator of the ESTATE OF DAVID BOIM, deceased; and JOYCE BOIM,

Plaintiffs-Appellees,

v.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, et al.,

Defendants-Appellants.

ARGUED SEPT. 10, 2008 - DECIDED DEC. 3, 2008

Before EASTERBROOK, *Chief Judge*, and POSNER, FLAUM, KANNE, ROVNER, WOOD, EVANS, WILLIAMS, SYKES, and TINDER, *Circuit Judges*.

POSNER, Circuit Judge.

In 1996 David Boim, a Jewish teenager who was both an Israeli citizen and an American citizen, living in Israel, was shot to death by two men at a bus stop near Jerusalem. His parents filed this suit four years later, alleging that his killers had been Hamas gunmen and naming as defendants Muhammad Salah plus three organizations: the Holy Land Foundation for Relief and Development, the American Muslim Society, and the Quranic

Literacy Institute. (A fourth, the Islamic Association of Palestine-National, appears to be either an alter ego of the American Muslim Society or just an alternative name for it, and need not be discussed separately. There are other defendants as well but they are not involved in the appeals.) The complaint accused the defendants of having provided financial support to Hamas before David Boim's death and by doing so of having violated 18 U.S.C. § 2333(a), which provides that "any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."

The district court denied the defendants' motion to dismiss the complaint for failure to state a claim, 127 F.Supp.2d 1002 (N.D.Ill.2001); the defendants had argued that providing financial assistance to a terrorist group is not an act of international terrorism and therefore is not within the scope of section 2333. We authorized an interlocutory appeal, 28 U.S.C. § 1292(b), and the panel that heard the appeal affirmed the district court. *Boim v. Quranic Literacy Institute,* 291 F.3d 1000 (7th Cir.2002). The case then resumed in that court. The court granted summary judgment in favor of the plaintiffs with respect to the liability of the three defendants other than the Quranic Literacy Institute. 340 F.Supp.2d 885 (N.D.Ill.2004). A jury was convened and, after a trial lasting a week, found the Institute-which

having filed a statement of "nonparticipation" attended but did not participate in the trial-liable. The jury then assessed damages of $52 million against all the defendants (including the ones not before us) jointly and severally. The amount was then trebled and attorneys' fees added.

These defendants again appealed, this time from a final judgment. The panel vacated the judgment and directed the district court to redetermine liability. 511 F.3d 707 (7th Cir.2007). Judge Evans agreed with the reversal as to the Holy Land Foundation but otherwise dissented.
The plaintiffs petitioned for rehearing en banc, and the full court granted the petition, primarily to consider the elements of a suit under 18 U.S.C. § 2333 against financial supporters of terrorism. The parties have filed supplemental briefs. A number of amici curiae have weighed in as well, including the Department of Justice, which has taken the side of the plaintiffs.

The first panel opinion rejected the argument that the statute does not impose liability on donors to groups that sponsor or engage in terrorism. The supplemental briefs do not revisit the issue, and at oral argument counsel for Salah and the Holy Land Foundation disclaimed reliance on their former position concerning the liability of donors. But in a letter to the court after oral argument, Salah's counsel indicated that the disclaimer had been based solely on a belief that the doctrine of law of the case foreclosed any further consideration of the statutory issue in this court. That was a mistake. The full

court can revisit any ruling by a panel. All arguments that the defendants have presented in their appeals are open today-and will be open in the Supreme Court. It is better to decide the question than to leave it hanging; why bother to address the elements of a legal claim that may not exist? Before deciding what a plaintiff must prove in order to recover from a donor under section 2333, we should decide whether the statute applies. *United States National Bank of Oregon v. Insurance Agents of America, Inc.*, 508 U.S. 439, 445-48, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

[1] Section 2333 does not say that someone who assists in an act of international terrorism is liable; that is, it does not mention "secondary" liability, the kind that 18 U.S.C. § 2 creates by imposing criminal liability on "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission," or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." See also 18 U.S.C. § 3 (accessory after the fact). The Supreme Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), held that section 10(b) of the Securities and Exchange Act of 1934, which prohibits securities fraud, does not reach aiding and abetting because it makes no reference to secondary liability, the kind of liability that statutes such as 18 U.S.C. §§ 2 and 3 create in criminal cases. The Court discussed the securities laws at length, but nothing in its holding turns on particular features of those laws.

[2] So statutory silence on the subject of secondary liability means there is none; and section 2333(a) authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors. Nevertheless the first panel opinion concluded that section 2333 does create secondary liability. It distinguished *Central Bank of Denver* as having involved an implied private right of action (for it was a private suit, yet section 10(b) does not purport to authorize such suits), while section 2333(a) expressly creates a private right. But as the dissenting Justices in *Central Bank of Denver* had pointed out, the majority's holding was not limited to private actions. 511 U.S. at 200, 114 S.Ct. 1439. It encompassed suits by the SEC, which section 10(b) authorizes expressly.

Congress agreed with this understanding of *Central Bank of Denver,* for the next year it enacted 15 U.S.C. § 78t(e) to allow the SEC in section 10(b) suits to obtain relief against aiders, abettors, and others who facilitate primary violations. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, --- U.S. ----, 128 S.Ct. 761, 771-72, 169 L.Ed.2d 627 (2008). The enactment of section 78t(e) would have been pointless had *Central Bank of Denver* allowed secondary liability to be imposed in suits, such as suits by the SEC under section 10(b), that the statute expressly authorizes. Years later, reaffirming *Central Bank of Denver,* the Supreme Court repeated that the earlier decision had not been limited to private suits under section 10(b). *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,

supra, 128 S.Ct. at 768-69.

The first panel opinion relied on *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000), an ERISA case involving an application of trust law. Trust law permits trust beneficiaries to maintain actions against third parties who have received trust assets improperly. ERISA not only does not upset this principle of trust law; it authorizes the Secretary of Labor to penalize third parties who "knowing[ly] participat[e]" in a fiduciary's misconduct. 29 U.S.C. §§ 1106(a), 1132(*l*)(1)(B). *Harris Trust* did not cite *Central Bank of Denver* and did not purport to limit its holding. *Stoneridge*, decided eight years after *Harris Trust*, also did not treat *Harris Trust* as circumscribing *Central Bank of Denver*-it did not even cite *Harris Trust*.

[3] To read secondary liability into section 2333(a), moreover, would enlarge the federal courts' extraterritorial jurisdiction. The defendants are accused of promoting terrorist activities abroad. Congress has the power to impose liability for acts that occur abroad but have effects within the United States, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004), but it must make the extraterritorial scope of a statute clear. *Small v. United States*, 544 U.S. 385, 388-89, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).

[4] The first panel opinion discussed approvingly an

alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333. The ground involves a chain of explicit statutory incorporations by reference. The first link in the chain is the statutory definition of "international terrorism" as "activities that ... involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States," that "appear to be intended ... to intimidate or coerce a civilian population" or "affect the conduct of a government by ... assassination," and that "transcend national boundaries in terms of the means by which they are accomplished" or "the persons they appear intended to intimidate or coerce." 18 U.S.C. § 2331(1). Section 2331 was enacted as part of the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 1003(a)(3), 106 Stat. 4506, 4521. Section 2333 (having been originally enacted in 1990 and repealed for a technical reason the next year) was reenacted in 1992 as part of that same Federal Courts Administration Act. So the two sections are part of the same statutory scheme and are to be read together. Nicholas J. Perry, "The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails," 30 *J. Legis.* 249, 257 (2004).

Section 2331(1)'s definition of international terrorism (amended in 2001 by the PATRIOT Act, Pub.L. No. 107-56, § 802(a)(1), 115 Stat. 272, 376, but in respects irrelevant to this case) includes not only violent acts but also "acts dangerous to human life that are a violation of the criminal laws of the United States." Giving money to Hamas, like giving

a loaded gun to a child (which also is not a violent act), is an "act dangerous to human life." And it violates a federal criminal statute enacted in 1994 and thus before the murder of David Boim-18 U.S.C. § 2339A(a), which provides that "whoever provides material support or resources ..., knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332]," shall be guilty of a federal crime. So we go to 18 U.S.C. § 2332 and discover that it criminalizes the killing (whether classified as homicide, voluntary manslaughter, or involuntary manslaughter), conspiring to kill, or inflicting bodily injury on, any American citizen outside the United States.

By this chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333. Which makes good sense as a counterterrorism measure. Damages are a less effective remedy against terrorists and their organizations than against their financial angels. Terrorist organizations have been sued under section 2333, e.g., *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir.2005); *Biton v. Palestinian Interim Self-Government Authority*, 252 F.R.D. 1 (D.D.C.2008); *Knox v. Palestine Liberation Organization*, 248 F.R.D. 420 (S.D.N.Y.2008), but to *collect* a damages judgment against such an organization, let alone a judgment against the terrorists themselves (if they can even be identified and thus sued), is, as the first panel opinion pointed out, 291 F.3d at 1021, well-nigh impossible. These

are foreign organizations and individuals, operating abroad and often covertly, and they are often impecunious as well. So difficult is it to obtain monetary relief against covert foreign organizations like these that Congress has taken to passing legislation authorizing the payment of judgments against them from U.S. Treasury funds. E.g., Victims of Trafficking and Violence Protection Act of 2000, Pub.L. No. 106-386, § 2002, 114 Stat. 1464. But that can have no deterrent or incapacitative effect, whereas suits against financiers of terrorism can cut the terrorists' lifeline.

And whether it makes good sense or not, the imposition of civil liability through the chain of incorporations is compelled by the statutory texts-as the panel determined in its first opinion. 291 F.3d at 1012-16. But in addition the panel placed a common law aiding and abetting gloss on section 2333. The panel was worried about a timing problem: section 2339A was not passed until 1994, and the defendants' contributions to Hamas began earlier. But that is not a serious problem on the view we take of the standard for proving causation under section 2333; we shall see that the fact of contributing to a terrorist organization rather than the amount of the contribution is the keystone of liability.

[5] Only because this is a very old case-David Boim was killed 12 years ago-does the 1994 effective date of section 2339A, two years before his killing, present an obstacle to liability, though only with respect to Salah and possibly the Holy Land

Foundation (but we are vacating the judgment against the latter anyway, as we shall explain). For there is no doubt that the other defendants made contributions after section 2339A's effective date. Salah, however, having been arrested by Israeli authorities in 1993 and not released until 1997, did not render material support to Hamas between the effective date of section 2339A and Boim's killing, so the judgment against him must be reversed. Few future cases will be affected by the timing issue, because few such cases will involve donations that were made after section 2333 was enacted in 1990 or re-enacted in 1992 but that ceased before 1994.

[6] In addition to providing material support after the effective date of section 2339A, a donor to terrorism, to be liable under section 2333, must have known that the money would be used in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad. We know that Hamas kills Israeli Jews; and Boim was an Israeli citizen, Jewish, living in Israel, and therefore a natural target for Hamas. But we must consider the knowledge that the donor to a terrorist organization must be shown to possess in order to be liable under section 2333 and the proof required to link the donor's act to the injury sustained by the victim. The parties have discussed both issues mainly under the rubrics of "conspiracy" and "aiding and abetting." Although those labels are significant primarily in criminal cases, they can be used to establish tort liability, see, e.g., *Halberstam v. Welch*, 705 F.2d 472 (D.C.Cir.1983); *Restatement (Second) of Torts* §§

876(a), (b) (1979), and there is no impropriety in discussing them in reference to the liability of donors to terrorism under section 2333 just because that liability is primary. Primary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors.

When a federal tort statute does not create secondary liability, so that the only defendants are primary violators, the ordinary tort requirements relating to fault, state of mind, causation, and foreseeability must be satisfied for the plaintiff to obtain a judgment. See, e.g., *Bridge v. Phoenix Bond & Indemnity Co.*, --- U.S. ----, 128 S.Ct. 2131, 2141-44, 170 L.Ed.2d 1012 (2008); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, *supra*, 128 S.Ct. at 769; *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). But when the primary liability is that of someone who aids someone else, so that functionally the primary violator is an aider and abettor or other secondary actor, a different set of principles comes into play. Those principles are most fully developed in the criminal context, but we must be careful in borrowing from criminal law because the state-of-mind and causation requirements in criminal cases often differ from those in civil cases. For example, because the criminal law focuses on the dangerousness of a defendant's conduct, the

requirement of proving that a criminal act caused an injury is often attenuated and sometimes dispensed with altogether, as in the statutes that impose criminal liability on providers of material support to terrorism (18 U.S.C. §§ 2339A, B, and C), which do not require proof that the material support resulted in an actual terrorist act, or that punish an attempt (e.g., 18 U.S.C. § 1113) that the intended victim may not even have noticed, so that there is no injury. The law of attempt has no counterpart in tort law, *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir.2008), because there is no tort without an injury. E.g., *Rozenfeld v. Medical Protective Co.*, 73 F.3d 154, 155-56 (7th Cir.1996); *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir.1994).

So prudence counsels us not to halt our analysis with aiding and abetting but to go on and analyze the tort liability of providers of material support to terrorism under general principles of tort law. We begin by noting that knowledge and intent have lesser roles in tort law than in criminal law. A volitional act that causes an injury gives rise to tort liability for negligence if the injurer failed to exercise due care, period. But more is required in the case of intentional torts, and we can assume that since section 2333 provides for an automatic trebling of damages it would require proof of intentional misconduct even if the plaintiffs in this case did not have to satisfy the state-of-mind requirements of sections 2339A and 2332 (but they do).

Punitive damages are rarely if ever imposed unless the defendant is found to have engaged in deliberate

wrongdoing. "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*§ 2, pp. 9-10 (5th ed.1984); see, e.g., *Molzof v. United States*, 502 U.S. 301, 305-07, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992); *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir.1996). Treble damages too, not being compensatory, tend to have a punitive aim. "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); see also *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-86, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 642 (7th Cir.2003); *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 435-36 (7th Cir.1989); *United States v. Mackby*, 261 F.3d 821, 830-31 (9th Cir.2001).

To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care. "When

the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk." *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir.2008). That is recklessness and equivalent to recklessness is "wantonness," which "has been defined as the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty injury will likely or probably result." *Graves v. Wildsmith*, 278 Ala. 228, 177 So.2d 448, 451 (1965); see also *Landers v. School District No. 203, O'Fallon*, 66 Ill.App.3d 78, 22 Ill.Dec. 837, 383 N.E.2d 645 (1978). "[I]n one case we read that 'willful and wanton misconduct approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it.' Similarly, [another case] defines 'willful and wanton' as exhibiting 'an utter indifference to or conscious disregard for' safety." *Fagocki v. Algonquin/Lake-in-the-Hills Fire Protection District*, 496 F.3d 623, 627 (7th Cir.2007) (citations omitted).

So it would not be enough to impose liability on a donor for violating section 2333, even if there were no state-of-mind requirements in sections 2339A and 2332, that the average person or a reasonable person would realize that the organization he was supporting was a terrorist organization, if the actual defendant did not realize it. That would just be negligence. But if you give a gun you know is loaded to a child, you know you are creating a substantial

risk of injury and therefore your doing so is reckless and if the child shoots someone you will be liable to the victim. See *Pratt v. Martineau,* 69 Mass.App.Ct. 670, 870 N.E.2d 1122 (2007); *Bowen v. Florida,* 791 So.2d 44, 48-49 (Fla.App.2001). That case should be distinguished from one in which the gun is given to an adult without adequately explaining the dangers-a case of negligent entrustment. To give a small child a loaded gun would be a case of *criminal* recklessness and therefore satisfy the state of mind requirement for liability under section 2333 and the statutes that it incorporates by reference. For the giver would know he was doing something extremely dangerous and without justification. "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Restatement, supra,* § 8A, comment b. That you did not desire the child to shoot anyone would thus be irrelevant, not only in a tort case, see *EEOC v. Illinois,* 69 F.3d 167, 170 (7th Cir.1995), but in a criminal case. *United States v. Fountain,* 768 F.2d 790, 798 (7th Cir.1985); cf. *United States v. Ortega,* 44 F.3d 505, 508 (7th Cir.1995).

A knowing donor to Hamas-that is, a donor who knew the aims and activities of the organization-would know that Hamas was gunning for Israelis (unlike some other terrorist groups, Hamas's terrorism is limited to the territory of Palestine, including Israel; see Council on Foreign Relations, "Hamas," www. cfr. org/ publication/ 8968/, visited Nov. 16, 2008), that Americans are frequent visitors

to and sojourners in Israel, that many U.S. citizens live in Israel (American Citizens Abroad, an advocacy group for expatriates, reports on the basis of State Department data that in 1999 there were about 184,000 American citizens living in Israel, accounting for about 3.1 percent of the country's population, www. aca. ch/ amabroad. pdf, visited Nov. 16, 2008), and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel. And given such foreseeable consequences, such donations would "appear to be intended ... to intimidate or coerce a civilian population" or to "affect the conduct of a government by ... assassination," as required by section 2331(1) in order to distinguish terrorist acts from other violent crimes, though it is not a state-of-mind requirement; it is a matter of external appearance rather than subjective intent, which is internal to the intender.

It is true that "the word 'recklessness' in law covers a spectrum of meaning, ranging from gross negligence in an accident case to the conduct of a robber in shooting at a pursuing policeman without aiming carefully." *Wright v. United States*, 809 F.2d 425, 427 (7th Cir.1987). In tort law it sometimes connotes merely gross negligence and at other times requires only that the defendant have acted in the face of an unreasonable risk that he should have been aware of even if he wasn't. But when, as in the passages we have quoted both from judicial opinions and from the *Restatement*, recklessness entails actual knowledge of the risk, the tort concept merges

with the criminal concept, which likewise "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); see also *Desnick v. American Broadcasting Cos.*, 233 F.3d 514, 517-518 (7th Cir.2000); American Law Institute, *Model Penal Code* § 2.02(2)(c) (1962) (defining recklessness as "consciously disregard[ing] a substantial and unjustifiable risk that the material element exists or will result from his conduct").

Critically, the criminal (like the tort) concept of recklessness is more concerned with the nature and knowledge of the risk that the defendant creates than with its magnitude. The Court in *Farmer v. Brennan* spoke of an "excessive" risk, a "significant" risk, a "substantial" risk, and an "intolerable" risk, 511 U.S. at 837-38, 842-43, 846, 114 S.Ct. 1970, the *Model Penal Code* of a "substantial and unjustifiable" risk, and the *Restatement* of an "unreasonable" risk, *Restatement, supra*, § 500, rather than assigning a minimum probability to the risk. These are *relative* terms; what is excessive, intolerable, etc., depends on the nature of the defendant's conduct. Ordinarily, it is true, the risk *is* great in a probabilistic sense; for the greater it is, the more likely it is to materialize and so give rise to a lawsuit or a prosecution and thus be mentioned in a judicial opinion. The greater the risk, moreover, the more obvious it will be to the risk taker, enabling the trier of fact to infer the risk taker's knowledge of the risk with greater confidence, see, e.g., *Farmer v. Brennan, supra*, 511 U.S. at 842, 114 S.Ct. 1970;

Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir.1985), though, as the *Farmer* decision emphasizes, subject to rebuttal. 511 U.S. at 837-42, 114 S.Ct. 1970.

But probability isn't everything. The risk that one of the workers on a project to build a bridge or a skyscraper will be killed may be greater than the risk that a driver will be killed by someone who flings rocks from an overpass at the cars traveling on the highway beneath. But only the second risk, though smaller, is deemed excessive and therefore reckless. *McNabb v. State*, 887 So.2d 929, 974-75 (Ala.Crim.App.2001). (The first risk might not even be negligent.) As we explained in *United States v. Boyd*, 475 F.3d 875, 877 (7th Cir.2007) (emphasis added), "firing multiple shots from a powerful gun ... in the downtown of a large city at a time when pedestrians ... are known to be in the vicinity creates a risk of harm that, *while not large in probabilistic terms*, is 'substantial' relative to the gratuitousness of the defendant's actions.... An activity is reckless when the potential harm that it creates ... is wildly disproportionate to any benefits that the activity might be expected to confer.... The emotional gratification that defendant Boyd derived from shooting into the night, though perhaps great, is not the kind of benefit that has weight in the scales when on the other side is danger to life and limb, even if the danger is limited, as it was here." *Lennon v. Metropolitan Life Ins. Co.*, 504 F.3d 617, 623 (6th Cir.2007), says that the risk must be "weighed against the lack of social utility of the activity" in adjudging its reasonableness. See also *Orban v.*

Vaughn, 123 F.3d 727, 733 (3d Cir.1997).

So if you give a person rocks who has told you he would like to kill drivers by dropping them on cars from an overpass, and he succeeds against the odds in killing someone by this means, you are guilty of providing material support to a murderer, or equivalently of aiding and abetting-for remember that when the primary violator of a statute is someone who provides assistance to another he is functionally an aider and abettor. The mental element required to fix liability on a donor to Hamas is therefore present if the donor knows the character of that organization.

The Court also said in *Farmer v. Brennan* that it was no defense that "he [a particular prison official] did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." 511 U.S. at 843, 114 S.Ct. 1970. That brings us to our next question-the standard of causation in a suit under section 2333.

It is "black letter" law that tort liability requires proof of causation. But like much legal shorthand, the black letter is inaccurate if treated as exceptionless. We made that point explicitly, with the aid of an example, in *Maxwell v. KPMG LLP*, 520 F.3d 713, 716 (7th Cir.2008): "when two fires join and destroy the plaintiff's property and each one would have destroyed it by itself *and so was not a necessary condition*... each of the firemakers (if negligent) is [nevertheless] liable to the plaintiff for

having 'caused' the injury. *Kingston v. Chicago & N.W. Ry.*, 191 Wis. 610, 211 N.W. 913 (Wis.1927)" (emphasis added); see also *United States v. Feliciano*, 45 F.3d 1070, 1075 (7th Cir.1995). (A "necessary condition" is another term for a "but for" cause. *Maxwell v. KPMG LLP, supra*, 520 F.3d at 716.)

The multiple-fire example and the principle that subtends it were explained at greater length in *United States v. Johnson*, 380 F.3d 1013, 1016 (7th Cir.2004): "[T]wo defendants each start a fire, and the fires join and destroy the plaintiff's house; either fire, however, would have destroyed his house. Each defendant could therefore argue that he should not be liable for the damage because it would have occurred even if he had not set his fire; but the law rejects the argument....[I]n the famous old case of *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 98 Wis. 624, 74 N.W. 561, 564 (1898), we read that 'it is no defense for a person against whom negligence which causes damages is established, to prove that without fault on his part the same damage would have resulted from the negligent act of the other, but each is responsible for the entire damage.' See also *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 146 Minn. 430, 179 N.W. 45, 49 (1920); *Collins v. American Optometric Ass'n*, 693 F.2d 636, 640 n. 4 (7th Cir.1982); *Housing 21, L.L.C. v. Atlantic Home Builders Co.*, 289 F.3d 1050, 1056-57 (8th Cir.2002); *Sanders v. American Body Armor & Equipment, Inc.*, 652 So.2d 883, 884-85 (Fla.App.1995); *Garrett v. Grant School Dist. No. 124*, 139 Ill.App.3d 569, 93 Ill.Dec. 874, 487 N.E.2d

699, 706 (1985); *Hart v. Browne,* 103 Cal.App.3d 947, 163 Cal.Rptr. 356, 363-64 (1980); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*§ 41, pp. 266-67 (5th ed.1984). The tortfeasor cannot avoid liability by pointing to an alternative *unlawful* cause of the damage that he inflicted.... [S]ince neither fire was a sine qua non of the plaintiff's injury, it could be argued that neither fire maker had committed a tort. Tort law rejects this conclusion for the practical reason that tortious activity that produces harm would go unsanctioned otherwise." The Prosser treatise also recognizes the multiple-fire case as one in which the plaintiff is not required to prove "but for" causation. Keeton et al., *supra,*§ 41, pp. 266-68; cf. Edward J. Schwartzbauer and Sidney Shindell, "Cancer and The Adjudicative Process: The Interface of Environmental Protection and Toxic Tort Law,"14 *Am. J.L. & Med.* 1, 31-32 (1988).

In the fire cases the acts of each defendant are sufficient conditions of the resulting injury, though they are not necessary conditions (that is, they are not but-for causes). But in *Summers v. Tice,* 33 Cal.2d 80, 199 P.2d 1 (1948), where two hunters negligently shot their rifles at the same time and a third hunter was hit by one of the bullets, it could not be determined which hunter's gun the bullet had come from and so it could not be proved by a preponderance of the evidence that either of the shooters was the injurer in either a sufficient-condition or a necessary-condition sense; for each hunter, the probability that he had caused the injury was only 50 percent, since one of the shots had missed. Nevertheless both defendants were held

jointly and severally liable to the injured person. See *Restatement, supra,* § 433B(3) and comment f; *Smith v. Cutter Biological,* 72 Haw. 416, 823 P.2d 717, 725 (1991); *In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740, 822-23 (E.D.N.Y.1984).

Similarly, if several firms spill toxic waste that finds its way into groundwater and causes damage to property but it is impossible to determine which firm's spill caused the damage, all are liable. See, e.g., *Chem-Nuclear Systems, Inc. v. Bush,* 292 F.3d 254, 259-60 (D.C.Cir.2002); *United States v. Alcan Aluminum Corp.,* 964 F.2d 252, 267-69 (3d Cir.1992); *Michie v. Great Lakes Steel Division,* 495 F.2d 213, 217-18 (6th Cir.1974); *Landers v. East Texas Salt Water Disposal Co.,* 151 Tex. 251, 248 S.W.2d 731, 734 (1952); *Phillips Petroleum Co. v. Hardee,* 189 F.2d 205, 211-12 (5th Cir.1951); 2 Frank P. Grad, *Treatise on Environmental Law* § 3.02 (2007); Kenneth S. Abraham, "The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview," 41 *Washburn L.J.* 379, 386-87 (2002). Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance (the common law basis for treating pollution as a tort), "pollution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because it is done in the context of what others are doing." Keeton et al., *supra,* § 52, p. 354.

In all these cases the requirement of proving causation is relaxed because otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury. If "each [defendant] bears a like relationship to the event" and "each seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy," the attempt at escape fails; each is liable. *Id.*,§ 41, p. 268.

But we must consider the situation in which there is uncertainty about the causal connection between the wrongful conduct of all potential tortfeasors and the injury. Suppose in our first case that there was a third fire, of natural origin (the result of a lightning strike, perhaps), and it alone might have sufficed to destroy the plaintiff's house. One might think the law would require the plaintiff to prove that it was more likely than not that had it not been for the defendants' negligence, his house would not have burned down-the fire of natural origin would have petered out before reaching it. Instead the law requires proof only that there was a substantial probability that the defendants' fires (or rather either of them) were the cause. See, e.g., *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry., supra,* 179 N.W. at 46; *Restatement, supra,* § 432(2) ("if two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in

bringing it about"); see also *id.*, illustration 3.

Our final example is *Keel v. Hainline,* 331 P.2d 397 (Okla.1958). Thirty to forty junior high school students showed up one day for their music class, but the instructor failed to show so the kids began throwing wooden erasers, chalk, and even a Coke bottle at each other. One of the students was struck in the eye by an eraser, and sued. One of the defendants, Keel, apparently had not thrown anything. But he had retrieved some of the erasers after they had been thrown and had handed them back to the throwers. There was no indication that Keel had handed the eraser to the kid who threw it at the plaintiff and injured her, but the court deemed that immaterial. It was enough that Keel had participated in the wrongful activity as a whole. He thus was liable even though there was no proven, or even likely, causal connection between anything he did and the injury. " 'One who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a wrongful act by another has been regarded as being as responsible as the one who commits the act so as to impose liability upon the former to the same extent as if he had performed the act himself.' " *Id.* at 401. The court did not use the term "material support," but in handing erasers to the throwers Keel was providing them with material support in a literal sense. It was enough to make him liable that he had helped to create a danger; it was immaterial that the effect of his help could not be determined-that his acts could not be found to be either a necessary or a sufficient condition of the injury.

[7] The cases that we have discussed do not involve monetary contributions to a wrongdoer. But then criminals and other intentional tortfeasors do not usually solicit voluntary contributions. Terrorist organizations do. But this is just to say that terrorism is *sui generis*. So consider an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes $1,000 to it, for a total of $100,000. The organization has additional resources from other, unknown contributors of $200,000 and it uses its total resources of $300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of $1,000. The tort principles that we have reviewed would make the defendant jointly and severally liable with all those other contributors. The fact that the death could not be traced to any of the contributors (as in the example the Supreme Court gave in *Farmer v. Brennan*) and that some of them may have been ignorant of the mission of the organization (and therefore not liable under a statute requiring proof of intentional or reckless misconduct) would be irrelevant. The knowing contributors as a whole would have significantly enhanced the risk of terrorist acts and thus the probability that the plaintiff's decedent would be a victim, and this would be true even if Hamas had incurred a cost of more than $1,000 to kill the American, so that no defendant's contribution was a sufficient condition of

his death.

This case is only a little more difficult because Hamas is (and was at the time of David Boim's death) engaged not only in terrorism but also in providing health, educational, and other social welfare services. The defendants other than Salah directed their support exclusively to those services. But if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook, as we noted in a related context in *Hussain v. Mukasey*, 518 F.3d 534, 538-39 (7th Cir.2008); see also *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 301 (3d Cir.2004). The reasons are twofold. The first is the fungibility of money. If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services "account" and depositing it in its terrorism "account." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C.Cir.2004).

Second, Hamas's social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas's popularity among the Palestinian population and providing funds for

indoctrinating schoolchildren. See, e.g., Justin Magouirk, "The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Service Provision, and Terrorism," 20 *Terrorism & Political Violence* 356 (2008); Eli Berman & David D. Laitin, "Religion, Terrorism, and Public Goods: Testing the Club Model" 7-10 (National Bureau of Econ. Research Working Paper No. 13725, 2008). Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability. To require proof that the donor *intended* that his contribution be used for terrorism-to make a benign intent a defense-would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent. It would also create a First Amendment Catch-22, as the only basis for inferring intent would in the usual case be a defendant's public declarations of support for the use of violence to achieve political ends.

Although liability under section 2333 is broad, to maintain perspective we note two cases that fall on the other side of the liability line. One is the easy case of a donation to an Islamic charity by an individual who does not know (and is not reckless, in the sense of strongly suspecting the truth but not caring about it) that the charity gives money to Hamas or some other terrorist organization.

The other case is that of medical (or other innocent) assistance by nongovernmental organizations such as the Red Cross and Doctors Without Borders that

provide such assistance without regard to the circumstances giving rise to the need for it. Suppose an Israeli retaliatory strike at Hamas causes so many casualties that the local medical services cannot treat all of them, and Doctors Without Borders offers to assist. And suppose that many of the casualties that the doctors treat are Hamas fighters, so that Doctors Without Borders might know in advance that it would be providing medical assistance to terrorists.

However, section 2339A(b)(1) excludes "medicine" from the definition of "material resources." And even if the word should be limited (an issue on which we take no position) to drugs and other medicines, an organization like Doctors Without Borders would not be in violation of section 2333. It would be helping not a terrorist group but individual patients, and, consistent with the Hippocratic Oath, with no questions asked about the patients' moral virtue. It would be like a doctor who treats a person with a gunshot wound whom he knows to be a criminal. If doctors refused to treat criminals, there would be less crime. But the doctor is not himself a criminal unless, besides treating the criminal, he conceals him from the police (like Dr. Samuel Mudd, sentenced to prison for trying to help John Wilkes Booth, Lincoln's assassin, elude capture) or violates a law requiring doctors to report wounded criminals. The same thing would be true if a hospital unaffiliated with Hamas but located in Gaza City solicited donations.

Nor would the rendering of medical assistance by the

Red Cross or Doctors Without Borders to individual terrorists "appear to be intended ... to intimidate or coerce a civilian population" or "affect the conduct of a government by ... assassination," and without such appearance there is no international terrorist act within the meaning of section 2331(1) and hence no violation of section 2333. Nor is this point limited to the rendering of *medical* assistance. For example, UNRWA (the United Nations Relief and Works Agency for Palestine Refugees in the Near East) renders aid to Palestinian refugees that is not limited to medical assistance to individual refugees, www. un. org/ unrwa/ english. html (visited Nov. 16, 2008). But so far as one can glean from its website (see *id.* and www. un. org/ unrwa/ allegations/ index. html, also visited Nov. 16, 2008), it does not give money to organizations, which might be affiliates of Hamas or other terrorist groups; it claims to be very careful not to employ members of Hamas or otherwise render any direct or indirect aid to it. *Id.*

To the objection that the logic of our analysis would allow the imposition of liability on someone who with the requisite state of mind contributed to a terrorist organization in 1995 that killed an American abroad in 2045, we respond first that that is not this case-the interval here was at most two years (1994, when section 2339A was enacted, to 1996, when Boim was killed)-and second that the imposition of liability in the hypothetical case would not be as outlandish, given the character of terrorism, as one might think. (There would of course be no defense of statute of limitations, since the limitations period would not begin to run until the tort was committed, and that

would not occur until the injury on which suit was based was inflicted.) Terrorism campaigns often last for many decades. Think of Ireland, Sri Lanka, the Philippines, Colombia, Kashmir-and Palestine, where Arab terrorism has been more or less continuous since 1920. Seed money for terrorism can sprout acts of violence long after the investment. In any event, whether considerations of temporal remoteness might at some point cut off liability is not an issue we need try to resolve in this case.

An issue to which the first panel opinion gave much attention (see 291 F.3d at 1021-27), but which received little attention from the parties afterward, is brought into focus by our analysis of the elements of a section 2333 violation. That is whether the First Amendment insulates financiers of terrorism from liability if they do not intend to further the illegal goals of an organization like Hamas that engages in political advocacy as well as in violence. If the financier knew that the organization to which it was giving money engaged in terrorism, penalizing him would not violate the First Amendment. Otherwise someone who during World War II gave money to the government of Nazi Germany solely in order to support its anti-smoking campaign could not have been punished for supporting a foreign enemy.

But it is true that "an organization is not a terrorist organization just because one of its members commits an act of armed violence without direct or indirect authorization, even if his objective was to advance the organization's goals, though the organization might be held liable to the victim of his

violent act." *Hussain v. Mukasey, supra,* 518 F.3d at 538. That is the principle of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The defendants in the present case could not be held liable for acts of violence by members of Hamas that were not authorized by Hamas. Nor would persons be liable who gave moral rather than material support, short of incitement, to violent organizations that have political aims. As intimated earlier in this opinion, a person who gives a speech in praise of Hamas for firing rockets at Israel is exercising his freedom of speech, protected by the First Amendment. See, e.g., *Communist Party of Indiana v. Whitcomb,* 414 U.S. 441, 447-49, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974); *Brandenburg v. Ohio,* 395 U.S. 444, 447-48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam). But as Hamas engages in violence as a declared goal of the organization, anyone who provides *material* support to it, knowing the organization's character, is punishable (provided he is enchained by the chain of statutory incorporations necessary to impose liability under section 2333) whether or not he approves of violence.

[8] Enough about the liability standard. We have now to consider its application to the facts. That turns out to be straightforward, except with respect to one of the defendants, the Holy Land Foundation, about which we can be brief because of the thoroughness of the panel's consideration. See 511 F.3d at 720-33. A principal basis for the district court's finding that the Foundation had violated the statute was the court's giving collateral estoppel

effect to findings made in *Holy Land Foundation for Relief & Development v. Ashcroft*, 219 F.Supp.2d 57 (D.D.C.2002), affirmed, 333 F.3d 156 (D.C.Cir.2003). The panel was unanimous that this ruling was erroneous.

In 2001 the Secretary of the Treasury determined that the Foundation "acts for or on behalf of" Hamas, and an order freezing the Foundation's funds was issued. The Foundation sued in the District of Columbia. The district court there found that the Secretary's finding was not "arbitrary and capricious" (the standard of review) and upheld the blocking order. Although the court recited extensive evidence that the Foundation knew that Hamas was and had long been a terrorist organization, 219 F.Supp.2d at 69-75, and it appears that most or perhaps all of the evidence related to its knowledge before 1996 when David Boim was killed, the validity of the blocking order did not depend on the Foundation's knowledge. 511 F.3d at 731; see Executive Order 13244, 66 Fed.Reg. 49079 (Sept. 23, 2001); Garry W. Jenkins, "Soft Power, Strategic Security, and International Philanthropy," 85 *N. Car. L.Rev.* 773, 808-09 (2007); Jennifer Lynn Bell, "Terrorist Abuse of Non-Profits and Charities: A Proactive Approach to Preventing Terrorist Financing," 17 *Kan. J.L. & Public Policy* 450, 458-59 (2008). If someone is giving money to an organization that the government knows to be a terrorist organization, any subsequent gift can be blocked whether or not the donor knows (or agrees with the government concerning) the nature of the recipient.

Even if the decision of the district court in the District of Columbia were read as finding that the Foundation knew that Hamas was a terrorist organization (and, as the court also found, that the Holy Land Foundation made contributions to Hamas after the effective date of 18 U.S.C. § 2339A, 219 F.Supp.2d at 70-71), such a finding would not have been essential to the judgment upholding the blocking order-and essentiality is at the heart of collateral estoppel. *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000); *Montana v. United States*, 440 U.S. 147, 159, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *H-D Michigan, Inc. v. Top Quality Service, Inc.*, 496 F.3d 755, 760 (7th Cir.2007); *Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir.1995); *Restatement (Second) of Judgments* § 27 (1982). If a finding is unnecessary to the judgment, the appellant has no reason to challenge it and if he does the appellate court has no reason to review it because it is irrelevant to the appeal-and so the appellant would not have his (full) day in court.

[9] So the judgment against the Foundation must be reversed and the case against it remanded for further proceedings to determine its liability. The judgment against Salah must also be reversed, as we explained earlier. Regarding the remaining defendants, the American Muslim Society and the Quranic Literacy Institute, the judgment of the district court was in our view correct. The activities of the American Muslim Society are discussed at length in the district court's second opinion. See 340

F.Supp.2d at 906-13. There we learn that while its activities included donating money to the Holy Land Foundation, there was much else besides. Moreover, the fact that the Foundation may not have known that Hamas was a terrorist organization (implausible as that is) would not exonerate the American Muslim Society, which *did* know and in giving money to the Foundation was deliberately funneling money to Hamas. The funnel doesn't have to know what it's doing to be an effective funnel.

Nor should donors to terrorism be able to escape liability because terrorists and their supporters launder donations through a chain of intermediate organizations. Donor *A* gives to innocent-appearing organization *B* which gives to innocent-appearing organization *C* which gives to Hamas. As long as *A* either knows or is reckless in failing to discover that donations to *B* end up with Hamas, *A* is liable. Equally important, however, if this knowledge requirement is not satisfied, the donor is not liable. And as the temporal chain lengthens, the likelihood that a donor has or should know of the donee's connection to terrorism shrinks. But to set the knowledge and causal requirement higher than we have done in this opinion would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare). Donor liability would be eviscerated, and the statute would be a dead letter.

[10] With regard to the Quranic Literacy Institute, the district court, after denying the Institute's motion for summary judgment, 340 F.Supp.2d at

929, submitted the case against the Institute to a jury trial but instructed the jury that Hamas was responsible for the murder of David Boim. The jury was left to decide whether the Institute had knowingly provided material support to Hamas. The jury found the Institute liable. By deciding not to participate in the trial, the Institute waived any objection it might have had to the jury instructions or the jury's findings.

In any event, the only factual determination underlying the judgment against the Institute, as against the American Muslim Society, that might be questioned-and was by the panel-was the determination, made by the district court on summary judgment, that Hamas had been responsible for the murder. The panel thought that the district judge had considered inadmissible evidence that the two terrorists who shot Boim were in fact members of Hamas.

Here is the panel's critique of the principal though not only evidence of their membership:

> To show that the murder of David Boim was the work of Hamas, the Boims submitted the declaration of Dr. Ruven [*sic*] Paz, a former member of the Israeli security community who describes himself as an expert in terrorism and counter-terrorism, Islamic movements in the Arab and Islamic world, Palestinian Islamic groups, and Palestinian society and politics. Based on his review of various exhibits submitted in connection with this case, his independent research, and his

knowledge of how Hamas and other Islamic terror organizations operate, Paz concluded that Hinawi and Al-Sharif had murdered David Boim, that Hinawi and Al-Sharif were members of Hamas at the time they killed Boim, and that Hamas itself had accepted responsibility for the murder....

In concluding that Al-Sharif was a member of Hamas and that Hamas had taken responsibility for the murder, Paz relied heavily on information set forth on certain websites that he attributed to Hamas. Paz explained that Hamas publicly acknowledges its terrorist acts and identifies its "martyrs" as a way to promote itself and to recruit new members. According to Paz, internet websites are a means by which Hamas disseminates such information. Paz's declaration asserts that scholars, journalists, and law enforcement routinely rely on the website postings of terrorist organizations for what they reveal about the activities of those organizations. Looking to certain websites whose content he asserts is controlled by Hamas, Paz found statements indicating that Hamas had taken responsibility for the Beit-El attack that took David Boim's life and that Al-Sharif was one of the participants in this attack. Paz repeated these statements in his declaration.

Paz's reliance upon, and his recounting of, internet website postings demand a certain caution in evaluating his prospective testimony. Such postings would not be admissible into evidence for their truth absent proper authentication, and this would typically require some type of proof that the

postings were actually made by the individual or organization to which they are being attributed-in this case, Hamas-as opposed to others with access to the website. Paz's declaration identifies the websites from which he quotes as ones controlled by Hamas, but it does not describe the basis for his conclusion, and consequently his declaration does not permit any independent assessment of the purported links between these sites and Hamas and the source of the postings that he recounts. Of course, the rules of evidence do not limit what type of information an expert may rely upon in reaching his opinion; even if that information would not otherwise be admissible in a court proceeding, an expert witness may rely upon it so long as it is the type of information on which others in the field reasonably rely. Indeed, Rule 703 now expressly permits the expert to disclose such information to the jury, provided the court is satisfied that its helpfulness in evaluating the expert's opinion substantially outweighs its prejudicial effect. Nonetheless, a judge must take care that the expert is not being used as a vehicle for circumventing the rule against hearsay. Where, as here, the expert appears to be relying to a great extent on web postings to establish a particular fact, and where as a result the factfinder would be unable to evaluate the soundness of his conclusion without hearing the evidence he relied on, we believe the expert must lay out, in greater detail than Paz did, the basis for his conclusion that these websites are in fact controlled by Hamas and that the postings he cites can reasonably and reliably be attributed to Hamas.

> Paz's conclusion that Hinawi was responsible for the murder of David Boim was based in significant part on two documents related to Hinawi's trial and sentencing by a Palestinian Authority tribunal: (1) a set of notes prepared by a U.S. foreign service officer who attended Hinawi's trial in February 1998, and (2) an Arabic-language document purporting to be the written verdict reflecting Hinawi's conviction and sentence. The foreign service officer's notes indicate that Hinawi was tried in open proceedings for participating in a terrorist act and acting as an accomplice in the killing of David Boim, that he was afforded counsel by the tribunal, that he contended in his defense that his friend Al-Sharif was the gunman and that Al-Sharif exploited his friendship with Hinawi by asking him to drive the car, and that he was convicted on both charges and sentenced to ten years. Paz's declaration accepts these documents as genuine and relies principally on them for the proposition that Hinawi participated in David Boim's murder and was convicted by the Palestinian Authority tribunal for the same.

Once again we have concerns about whether the record as it stands lays an appropriate foundation for these documents. We can assume that the report of a U.S. government official who, in the course of his duties, observed a trial in a foreign tribunal may constitute proof of what occurred in that proceeding. We also have no doubt that a properly authenticated, official report of a judgment issued by a foreign tribunal constitutes adequate proof of that judgment.

The difficulty we have with Paz's reliance upon these documents is that they have not been properly authenticated. The foreign service officer's notes are unsigned and reveal nothing about the circumstances under which they were prepared. The document that we are told is the official verdict is entirely in Arabic, is not readily evident as an official document, and is unaccompanied by an English translation. There is a single cover note, on the letterhead of the U.S. Consulate General in Jerusalem, which accompanies these documents and explains what they are. But the cover note itself is unsigned and does not even identify its author. This is unacceptable. We assume that Paz knows more about these documents and that he would not have relied upon them if he had doubts about their authenticity. But given that Paz relies almost exclusively on these documents as proof of Hinawi's complicity in Boim's murder, and because a factfinder could not evaluate the soundness of Paz's conclusion without knowing what these documents say, an appropriate foundation must be laid for these documents before the conclusions that Paz has drawn from these documents may be admitted.

511 F.3d at 752-54 (citations omitted).

We accept the panel majority's description of the infirmities of the evidence on which Reuven Paz (formerly research director of Shin Bet, Israel's domestic security agency) based his expert opinion. But we do not agree that the district court abused its discretion in allowing the opinion into evidence. As the quoted passage acknowledges (albeit grudgingly,

in its warning against using an expert witness "as a vehicle for circumventing the rule against hearsay"), an expert is not limited to relying on admissible evidence in forming his opinion. Fed.R.Evid. 703; *Wendler & Ezra, P.C. v. American Int'l Group, Inc.*, 521 F.3d 790, 791 (7th Cir.2008); *In re James Wilson Associates*, 965 F.2d 160, 172-73 (7th Cir.1992); *United States v. Locascio*, 6 F.3d 924, 938 (2d Cir.1993). That would be a crippling limitation because experts don't characteristically base their expert judgments on legally admissible evidence; the rules of evidence are not intended for the guidance of experts. Biologists do not study animal behavior by placing animals under oath, and students of terrorism do not arrive at their assessments solely or even primarily by studying the records of judicial proceedings. Notice, moreover, that there was no need for the plaintiffs to prove that *both* Al-Sherif and Hinawi were complicit in Boim's death; if either was complicit and a member of Hamas, that is enough to fix responsibility on Hamas for killing Boim.

In dissenting from the panel's ruling Judge Evans offered an assessment of Paz's evidence (see 511 F.3d at 758) that we find persuasive. An expert on terrorism in the Arab world, fluent in Arabic, Paz explained that the websites of Islamic movements and Islamic terrorist organizations have long been accepted by security experts as valid, important, and indeed indispensable sources of information. Terrorist organizations rely on the web to deliver their messages to their adherents and the general public. The United States Institute for Peace, a

nonpartisan federal institution created by Congress, published an extensive report, submitted to the district court along with Paz's declaration, on the use of the Internet by terrorists. And-critically-the defendants presented no evidence to contradict Paz: no evidence that the killing of Boim was *not* a Hamas hit. Had they thought Paz had mistranslated the Arabic judgment against Hinawi, they could have provided the district court with their own translation. Had they doubted that Paz can identify a Hamas website (he gave the web addresses of several of them), they could have presented testimony to that effect. Paz's 12-page declaration is detailed, concrete, and backed up by a host of exhibits. The district court did not abuse its discretion in admitting his evidence; and with it in the record and *nothing* on the other side the court had no choice but to enter summary judgment for the plaintiffs with respect to Hamas's responsibility for the Boim killing.

To summarize, the judgment of the district court is affirmed except with respect to (1) Salah, as to whom the judgment is reversed with instructions to enter judgment in his favor; (2) the Holy Land Foundation, as to which the judgment is reversed and the case remanded for further proceedings consistent with this opinion; and (3) the award of attorneys' fees-for we adopt the panel's criticisms of that award, 511 F.3d at 749-50, and anyway the award will have to be adjusted because of the further proceedings on remand that we are ordering.

AFFIRMED IN PART, REVERSED IN PART, AND

REMANDED.

ROVNER, Circuit Judge, with whom WILLIAMS, Circuit Judge, joins, concurring in part and dissenting in part.[FN1]

> FN1. Judge Wood also joins this opinion except as to Salah's liability.

At this late stage in the litigation, we are now turning to a fundamental question: Are we going to evaluate claims for terrorism-inflicted injuries using traditional legal standards, or are we going to re-write tort law on the ground that "terrorism is *sui generis* "? *Ante* at 698. My colleagues in the majority have opted to "relax[ ]"-I would say eliminate-the basic tort requirement that causation be proven, believing that "otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." *Ante* at 697. The choice is a false one. The panel took pains to identify a number of ways in which the plaintiffs might establish a causal link between the defendants' financial contributions to (and other support for) Hamas and the murder of David Boim.*Boim II*, 511 F.3d at 741-43. It is not the case that the plaintiffs were unable show causation, it is rather that they did not even make an attempt; and that was the purpose of the panel's decision to remand the case.[FN2] But rather than requiring the plaintiffs to present evidence of causation and allowing the factfinder to determine whether causation has been shown, the majority simply deems it a given, declaring as a matter of law that any money knowingly given to a terrorist

organization like Hamas is a cause of terrorist activity, period. This sweeping rule of liability leaves no role for the factfinder to distinguish between those individuals and organizations who directly and purposely finance terrorism from those who are many steps removed from terrorist activity and whose aid has, at most, an indirect, uncertain, and unintended effect on terrorist activity. The majority's approach treats all financial support provided to a terrorist organization and its affiliates as support for terrorism, regardless of whether the money is given to the terrorist organization itself, to a charitable entity controlled by that organization, or to an intermediary organization, and regardless of what the money is actually used to do.

> FN2. Judge Evans, in his dissent from this holding, not only thought that the plaintiffs could show causation, but that they already had. 511 F.3d at 760-61.

The majority's opinion is remarkable in two additional respects. By treating all those who provide money and other aid to Hamas as primarily rather than secondarily liable-along with those who actually commit terrorist acts-the majority eliminates any need for proof that the aid was given with the intent to further Hamas's terrorist agenda. Besides eliminating yet another way for the factfinder to distinguish between those who deliberately aid terrorism from those who do so inadvertently, this poses a genuine threat to First Amendment freedoms. Finally, the majority sustains the entry of summary judgment on a basic factual question-Did Hamas kill David Boim?-based on an

expert's affidavit that both relies upon and repeats multiple examples of hearsay. Rather than sustain the panel's unexceptional demand that the expert's sources be proven reliable, consistent with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469 (1993), the majority gives its blessing to circumventing the rules of evidence altogether.

Thus, although I concur in the decision to remand for further proceedings as to HLF, I otherwise dissent from the court's decision.

1.

One point of clarification at the outset. The majority's opinion reads as though the defendants were writing checks to Hamas, perhaps with a notation on the memo line that read "for humanitarian purposes." If indeed the defendants were directing money into a central Hamas fund out of which all Hamas expenses-whether for humanitarian or terrorist activities-were paid, it would be easy to see that the defendants were supporting Hamas's terrorism even if their contributions were earmarked for charity. In fact, the case is not as simple as that. For example, much of the money that defendant HLF provided to Hamas apparently was directed not to Hamas per se but to a variety of zakat committees and other charitable entities, including a hospital in Gaza, that were controlled by Hamas. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F.Supp.2d 57, 70-71 (D.D.C.2002), *j. aff'd*, 333 F.3d 156

(D.C.Cir.2003).[FN3] I gather that this is a distinction without a difference in the majority's view, and certainly I agree that if the zakat committees and other recipients of HLF's funding were mere fronts for Hamas or were used to launder donations targeted for Hamas generally, then those donations ought to be treated as if they were direct donations to Hamas itself.[FN4] But to the extent that these Hamas subsidiary organizations actually were engaged solely in humanitarian work and HLF was sending its money to those subsidiaries to support that work, HLF is one or more significant steps removed from the direct financing of terrorism and the case for HLF's liability for terrorism is, in my view, a much less compelling one. Defendant AMS is yet another step removed, in that AMS is alleged to have contributed money not to Hamas but to HLF.

> FN3. HLF's ties to Hamas have yet to be evaluated in this litigation, because the district court erroneously gave collateral estoppel effect to the D.C. Circuit's determination that HLF funded terrorism by funding Hamas and its affiliates. *See ante* at 700-01; *Boim II*, 511 F.3d at 726-33.
>
> FN4. Thus, when I discuss aid given to zakat committees and other organizations controlled by or affiliated with Hamas, I am assuming that they are not, in fact, mere fronts for Hamas that are used to launder donations meant to fund Hamas's terrorism.

Moreover, the type of support that can give rise to

civil liability is not limited to financial support. As the panel discussed in *Boim I,* civil liability under section 2333(a) can result from the provision of "material support or resources" to terrorism and to terrorist organizations as prohibited by 18 U.S.C. §§ 2339A and 2339B, *see* 291 F.3d at 1012-17, and "material support or resources" is defined broadly to include not only weapons and money but "any property, tangible or intangible, or service," including such things as lodging, expert advice, training, and personnel. § 2339A(b)(1). Notably, the plaintiffs have sought to hold AMS liable, and the district court found it liable, not simply for the financial support it provided to HLF, but for various types of pro-Hamas advocacy, such as hosting Hamas speakers at its conferences, publishing sympathetic editorials in its newsletter, and the like. *See Boim v. Quranic Literacy Inst.,* 340 F.Supp.2d 885, 908-13 (N.D.Ill.2004).

So the majority's rule has the potential to sweep within its reach not only those who write checks to Hamas and the organizations that it controls but also individuals and groups who support Hamas and its affiliates in myriad other ways, including those who advocate on Hama's behalf. My point is not that there is no case to be made for imposing liability on such supporters for Hamas's terrorist acts. My point is simply that the basis for their liability is not nearly as clean and straightforward as it might seem from the majority's opinion.

2.

The majority has chosen to evaluate the prospective liability of the defendants in this case through the lens of primary liability, reasoning that those who provide financial and other aid to terrorist organizations are themselves engaging in terrorism and thus may be held liable on the same basis as those who actually commit terrorist acts.[FN5] In formulating its theory of primary liability, the majority relies in part upon section 2331(1)'s definition of "international terrorism" and partly upon section 2339A(a)'s criminal proscription against providing material support or resources to terrorists. Treating the defendants as primarily rather than secondarily liable enables the majority to accomplish two things: First, it compensates for what the majority believes was Congress's failure in section 2333(a) to authorize the imposition of secondary liability on those who aid or abet terrorist acts or conspire with terrorists. Second, it eliminates any need for proof of a defendant's intent to support terrorism; a defendant's knowledge that it is providing aid to an organization that engages in terrorism is deemed enough to hold that defendant liable for the organization's terrorist acts.

> FN5. There is a point in the majority's opinion at which it appears to describe its liability framework as one that straddles both primary and secondary liability. After concluding that Congress did not authorize the imposition of secondary liability under section 2333(a), *ante* at 688-90, the majority goes on to say that "there is no impropriety in discussing" such secondary liability theories as conspiracy and

> aiding and abetting, *ante* at 691, and that "[p]rimary liability in the form of material support to terrorism has the character of secondary liability,"*ante* at 691. I must confess to some uncertainty as to the majority's meaning. What is clear to me is that the majority has rejected the theories of secondary liability discussed in *Boim I* and *Boim II*, and at the same time the majority is not conditioning liability under section 2333(a) on proof of a defendant's intent or agreement to aid terrorism, which would of course be necessary to recover under a traditional aiding and abetting or conspiracy theory of liability. I shall therefore describe the majority's liability framework as one of primary liability while recognizing that the majority sees some continued relevance-I am not sure what-in aiding and abetting and conspiracy concepts to liability under section 2333.

For the reasons outlined in the *Boim I* opinion, I continue to believe that Congress when it enacted section 2333(a) subjected to civil liability not only those who engage in terrorism but also those who aid or abet terrorism. 291 F.3d at 1016-21. The government as an *amicus curiae* has expressed agreement with that view. The secondary liability framework is a much more natural fit for what the defendants here are alleged to have done and as I shall discuss below, the elements of aiding and abetting serve a useful function in distinguishing between those who intend to aid terrorism and those

who do not.

But even if I am wrong about the availability of secondary liability under section 2333(a), I have my doubts about the viability of the majority's theory of primary liability. For there are conceptual problems with this approach, particularly as it is applied in this case. These problems may help to explain why the plaintiffs have long since abandoned any theory of primary liability and have relied solely on theories of secondary liability in this appeal. And it makes it all the more extraordinary that this court has gone out on a limb to craft a liability standard that none of the parties has advocated.

The majority first posits that the defendants' alleged conduct falls within section 2331(1)'s definition of "international terrorism," *ante* at 689-90, but the fit is by no means perfect. In full, the statutory definition of the term reads as follows:

> [T]he term "international terrorism" means activities that-
>
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended-
>
> (i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion;

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum[.]

18 U.S.C. § 2331(1). The language of this definition certainly is broad enough to reach beyond bomb-throwers and shooters to include those who provide direct and intentional support to terrorists: someone who ships arms to a terrorist organization, for example, easily could be thought to be engaging in activity that "*involve[s]* violent acts or acts dangerous to human life" as set forth in section 2331(1)(A). *See Boim I*, 291 F.3d at 1014-15. But it is far from clear that sending money to a Hamas-controlled charitable organization, for example, is on par with that type of direct support for terrorism. It may be, as the majority posits, that donations to Hamas's humanitarian wing indirectly aid its terrorism by freeing up other funds for terrorism, by giving cover to Hamas, and by otherwise enhancing Hamas's image. But it is difficult if not implausible to characterize donations that are earmarked and used for humanitarian work as violent or life-threatening acts as referenced in section 2331(1)(A).

Nor is it evident (to say the least) that financially supporting a Hamas-affiliated charity is an act that "appear[s] to be intended" to have the sorts of coercive or intimidating effects on government policy or upon a civilian population as described in section 2331(1)(B).

It may be more plausible to say, as the majority does, that one who provides financial support to Hamas, even to its charitable subsidiaries, is "provid [ing] material support or resources" to Hamas's terrorist acts in violation of section 2339A(a) by increasing the heft of Hamas's purse. *See ante* at 690-91. But that theory too has its problems. The language of section 2339A(a) requires that the material support or resources be given with the knowledge or intent that they "*are to be used* in preparation for, or in carrying out" one of a number of specified crimes, including as relevant here the killing of American citizens. (Emphasis mine.); *see ante* at 690, citing 18 U.S.C. § 2332. In other words, the donor must at least know that the financial or other support he lends to Hamas *will be used* to commit terrorist acts. In *Boim I*, the panel agreed that giving money to Hamas with the purpose of financing its terrorism would both violate section 2339A(a) and give rise to civil liability under section 2333. 291 F.3d at 1012-16. But at that early stage of this litigation, the Boims had a straightforward and direct theory that Hamas's American contributors (including HLF) intended for their money be used to support terrorism, that the zakat committees and other humanitarian organizations to which these contributors were sending their money were mere

fronts for Hamas, and that the money received by these front organizations was laundered and funneled into Hamas's coffers to fund terrorist activity, including the attack that took David Boim's life. *See id.* at 1004. That theory was consistent with the express terms of section 2339A(a). But that is no longer the Boims' theory (they have long since abandoned it in favor of aiding and abetting and conspiracy), nor is it the majority's. The majority posits that any money given to a Hamas affiliate, even if it is given with a benign intent and even if it is actually put to charitable use, furthers Hamas's terrorism in one way or another. *Ante* at 698. Even if that is so, not all donors will know or intend that their contributions will be used to commit the sorts of criminal acts identified in section 2339A(a). And what the statute proscribes is the knowing or intentional support of specific terrorist acts, not the knowing support of a terrorist organization. If nothing else, the defendants' contributions to charitable organizations controlled by Hamas would present a factual question as to whether the defendants knew that they were supporting the murder of American citizens or any of the other crimes listed in section 2339A(a).

3.

Causation, as the majority acknowledges, is a staple of tort law, *ante* at 695, and yet the majority relieves the plaintiffs of any obligation to demonstrate a causal link between whatever support the defendants provided to Hamas and Hamas's terrorist activities (let alone David Boim's murder in

particular). Instead, the majority simply declares as a matter of law that any money given to an organization like Hamas that engages in both terrorism and legitimate, humanitarian activity, necessarily enables its terrorism, regardless of the purpose for which the money was given or the channel through which the organization received it. "Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." *Ante* at 698. This is judicial activism at its most plain. The majority offers no rationale for relieving the plaintiffs of the burden of showing causation, and there is none that I can discern. The panel in *Boim II* expressly disavowed any requirement that the Boims link specific donations or other acts of support to David Boim's murder in particular. 511 F.3d at 741. But it did insist on proof that the types of support the defendants were alleged to have given Hamas were, in fact, a cause of Hamas's terrorism. *Id.* at 741-43. The panel outlined multiple ways in which the plaintiffs might show that support given to Hamas, even donations to its humanitarian activities, furthers its terrorist agenda, such that it could be considered a cause of David Boim's murder. *Id.* Someone familiar with Hamas's financial structure, or with the financing of terrorism generally, presumably could provide that sort of testimony. But the majority is not even conditioning liability on expert opinion that might link the various types of support provided to Hamas with its terrorist acts. Expert testimony as to the ways in which even aid to Hamas's humanitarian wing enables terrorism

would be subject to adversarial testing and the judgment of the factfinder based on the totality of the evidence put before the court. But rather than subject the notion of causation to those checks, the majority, acting as though we ourselves are experts, simply declares causation to be a given that cannot be challenged. Liability under the majority's announced rule is sweeping: one who gives money to any Hamas entity, even if it is a small donation to help buy an x-ray machine for a Hamas hospital, is liable from now until the end of time for any terrorist act that Hamas might thereafter commit against an American citizen outside of the United States. (The majority itself acknowledges that under its approach a contribution to a terrorist organization in 1995 might render the donor liable for the murder of an American citizen committed by that organization fifty years later. *Ante* at 700.) This type of across-the-board judgment is out of place in the realm of torts. As an appellate court, it is our job to articulate a framework of liability under the statute and thereafter leave it to the parties to present evidence pursuant to that framework and to the factfinder to determine whether or not liability has been established. Where it is open to question, as I believe it is, whether even humanitarian support given to Hamas, to its charitable subsidiary, or to a hospital or other institution that receives funding from Hamas, actually contributes to Hamas's terrorist activities, it should be left to factfinding in individual cases (subject, of course, to appellate review) to evaluate, based on the evidence presented in those cases, what types of support to Hamas and its affiliated entities actually cause

terrorism. *Cf. Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744-45 (7th Cir.2008) (where the claims of multiple plaintiffs present complex factual questions, it is preferable to let those claims be resolved via individual lawsuits, so that the aggregate outcome fairly reflects the uncertainty of the plaintiffs' claims, rather than risk error by having the issue resolved on a class-wide basis by a single trier of fact).

The majority's decision to carve out an exception to its sweeping liability rule for non-governmental organizations like the Red Cross and Doctors Without Borders who provide humanitarian aid to individuals affiliated with Hamas lays bare the weakness of the rule's analytical underpinnings.[FN6] Providing medical care on the battlefield to individuals that one knows are Hamas terrorists (*see ante* at 699) undoubtedly would have the effect of aiding Hamas's terrorism-patching up an injured terrorist enables him to strike again. I do not doubt that such aid could be given for noble and compassionate reasons, but neither do I doubt that from the standpoint of the Israelis whom Hamas targets, the knowing provision of medical care to individual terrorists could be and would be understood as aid to terrorism. One can also imagine scenarios in which medical aid could be provided for ignoble and devious reasons. *Cf. United States v. Alvarez-Machain*, 504 U.S. 655, 657, 112 S.Ct. 2188, 2190, 119 L.Ed.2d 441 (1992) (physician indicted for participating in the kidnap and murder of agent of Drug Enforcement Administration by helping to prolong captured agent's life so that others could

continue to interrogate and torture him). Yet, for no apparent reason other than our own sense that organizations like the Red Cross and Doctors Without Borders are good and do good, the majority simply declares them exempt from the broad liability standard that it has announced. *Ante* at 699. On the other hand, any other individual or organization that gives to a Hamas-controlled charity is deemed liable, regardless of whether the money is given with a humanitarian purpose and regardless of whether the money is, in fact, put to humanitarian use. So one cannot fund the construction of a Hamas hospital, buy the hospital an x-ray machine, or volunteer her medical services to the hospital, because this is not providing direct aid to individuals in the manner of the Red Cross. My colleagues reason that there is a distinction between providing aid to an individual, even if he is terrorist, and aid to a terrorist organization. *Ante* at 699. But to my mind, that is a distinction without a difference when one knows that the individual being aided is engaged in terrorism (or is recklessly indifferent to that possibility). For example, the majority notes that one way in which Hamas uses its social welfare activities to reinforce its terrorist agenda is by providing economic aid to the families of killed, wounded, or captured Hamas terrorists, which ensures the continued loyalty of these family members to Hamas. *Ante* at 698. In that respect, one who donates money to Hamas in order to fund such payments thus could be thought to be promoting terrorism. Yet, the same could be said of a donor who instead makes payments directly to the family members of terrorists rather than giving the money to Hamas. Indeed, that is exactly what HLF

is alleged to have done (among other things). *See Boim II*, 511 F.3d at 722; *Holy Land Found. for Relief & Dev.*, 219 F.Supp.2d at 71-73. So providing this type of aid to individuals, rather than to Hamas, would be accomplishing the same end, notwithstanding the fact that the donor was giving aid to individuals rather than to a terrorist organization. *See Singh-Kaur v. Ashcroft*, 385 F.3d 293, 301 (3d Cir.2004) (providing food and shelter to militant Sikhs who had committed or planned to commit terrorist acts constituted material support for terrorism). The distinction between aiding an organization and aiding individual members of that organization does not hold up.

> FN6. True, "medicine" is excluded from the definition of the "material support or resources" to terrorists proscribed by section 2339(A)(a), *see ante* at 699, citing § 2239(A)(b)(1). But to the extent that the medical exclusion lets an organization like the Red Cross off the hook (although I note that the services of the Red Cross are not limited to medical aid), then it logically ought to exonerate those who fund medical services provided by Hamas hospitals, for example, for the statute in no way suggests that the exclusion depends on how the medical aid is provided. Yet the majority insists that funding a Hamas hospital would render the donor liable while directly aiding individual Hamas terrorists would not. *See ante* at 698, 699.

It is only the majority's sweeping rule of liability

that puts humanitarian organizations like Doctors Without Borders in peril and that forces the majority to carve out an unprincipled exemption for such organizations. If a plaintiff were required to establish a donor's intent to aid terrorism, along with a causal link between the aid provided and terrorist activity, then the factfinder would be able to draw reasoned, pragmatic distinctions (subject, of course, to appellate review) between those defendants who are truly enabling terrorism and those who are not.

4.

The secondary liability framework that we outlined in *Boim I*, and on which the plaintiffs built their entire case against the defendants, provides a more grounded and effective way of identifying and distinguishing between the types of support and supporters that actually aid terrorism and those that do not. As the panel recognized, those who aid and abet Hamas's terrorism can be held liable to the same extent as those who commit the terrorist acts. *Boim I*, 291 F.3d at 1016-21. But in addition to showing knowledge of Hamas's terrorist activity and the provision of financial or other support to Hamas, aiding and abetting would require proof of an intent to help Hamas's terrorist activities succeed. *Id.* at 1021, 1023.

Proof of intent would serve two important functions. First, it would serve to single out the most culpable of Hamas's financiers and other supporters by focusing on those who actually mean to contribute to its terrorist program, as opposed to those who may

unwittingly aid Hamas's terrorism by donating to its charitable arm. I think it would be possible to infer the intent to further terrorism in a number of scenarios. Donations to Hamas itself have been a crime since 1997, for example, when Hamas was formally designated a foreign terrorist organization pursuant to 8 U.S.C. § 1189, *see* § 2339B(a) and (g)(6); and so a prohibited donation in the wake of that designation would be prima facie proof of one's intent to further terrorism.[FN7] The same could be said of donations to zakat committees and other organizations that themselves have been formally designated as terrorist organizations based on their links with Hamas. On the other hand, a factfinder confronted with evidence that a donor gave only to a non-designated, Hamas-controlled hospital for the purpose of funding the medical services provided by that hospital would be free to conclude that the donor had a benign intent and did not aid or abet Hamas's terrorism even if, in the abstract, one might believe that furthering Hamas's humanitarian activity enhances its image and thereby supports its violent activities. The ability of the factfinder to draw such distinctions is important, given the difficulty there might be in deciding, under the majority's standard, what constitutes a terrorist organization and what constitutes the knowing provision of support to such an organization. Organizations that openly embrace terrorism as their declared goal are easy to categorize as terrorist organizations. But what about organizations that engage in terrorism but disclaim responsibility? Or organizations whose members frequently engage in terrorist acts with implicit but not explicit approval

from the organizations themselves? And what are we to make of charitable entities that are affiliated with such organizations? Or charitable entities that receive some but not all of their funding from such organizations-a hospital that receives contributions from Hamas but is not controlled by it, for example? I am not sure just how far the majority's liability rule extends. Insisting on proof of a donor's intent to support terrorism would help to confirm the donor's culpability in instances where the terrorist nature of the organization receiving aid is less clear than it would be if a donor were making out a check payable to Hamas. It would also serve as a principled way to exempt organizations like the Red Cross and Doctors Without Borders, who engage in humanitarian work that may incidentally or tangentially aid individual terrorists or terrorist organizations, but who have no intent to aid terrorist activity.

> FN7. Hamas previously had been designated a terrorist organization in January 1995 (some fourteen months before David Boim was killed) and donations to Hamas were prohibited from that point forward. *See Boim II,* 511 F.3d at 720. But the criminal penalties of section 2339B were not triggered until 1997 (the year after Boim was murdered), when Hamas was designated a foreign terrorist organization pursuant to section 1189. *See Boim I,* 291 F.3d at 1016.

The intent requirement would also play a vital role in protecting the First Amendment rights of those accused of facilitating Hamas's terrorism. The

possibility that a section 2333(a) suit might implicate First Amendment rights is not an abstract one. Even to the extent that such a suit is based on the money that a defendant has contributed to an organization that engages in terrorism, the defendant's First Amendment rights must be accounted for, given that donating money to an organization, though it is not speech in and of itself, is one way to express affinity with that organization and to help give voice to the viewpoints that organization espouses. *See Buckley v. Valeo,* 424 U.S. 1, 65-66, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976) (per curiam) ("The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.' ") (quoting *NAACP v. Alabama,* 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958)); *see also Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). Certainly, given the government's paramount interest in battling terrorism, the government may prospectively ban, and even criminalize, donations to an organization that it deems a terrorist organization. *See*§ 2339B(a); *Boim I,* 291 F.3d at 1027; *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1135 (9th Cir.2000). Hamas was so designated in 1997, the year after David Boim was murdered. *See* n. 7, *supra.* But when an organization engages in both legal and illegal activities and donations to that organization have not been prohibited, a donor may not be held civilly liable for the organization's illegal activity based solely on his contributions, for to do so

would infringe upon the defendant's First Amendment freedoms. *In re Asbestos School Litigation,* 46 F.3d 1284, 1290 (3d Cir.1994) (Alito, J.).

And money is not the only type of support that the defendants are alleged to have provided Hamas. One need only look again at the conduct for which AMS was held liable by the district court: hosting Hamas speakers at its conferences, publishing pro-Hamas articles and editorials in his newsletters, rallying support for HLF when it was declared a terrorist organization, and so forth. 340 F.Supp.2d at 908-13. All of that conduct involves pure speech. *See ante* at 700; *Boim I,* 291 F.3d at 1026.

And so the First Amendment is very much implicated by this case. Both through their contributions of money to Hamas and its subsidiary organizations, and (in the case of AMS) through their advocacy on behalf of Hamas, the defendants have demonstrated an affiliation with and affinity for Hamas. But *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), holds that an individual may not be held civilly liable for his mere association with an organization whose members engage in illegal acts.

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific

intent to further those illegal aims.

Id. at 920, 102 S.Ct. at 3429 (footnote omitted). Moreover, an individual's intent vis-à-vis an organization that holds both lawful and unlawful purposes "must be judged 'according to the strictest law,' "for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."

Id. at 919, 102 S.Ct. at 3429 (quoting *Noto v. United States,* 367 U.S. 290, 299-300, 81 S.Ct. 1517, 1521, 6 L.Ed.2d 836 (1961)). The panel in *Boim I* recognized that the aiding and abetting standard is consistent with the rule announced in *Claiborne Hardware* in that it conditions liability on proof that a defendant knew of the organization's illegal purposes *and* had the intent to further those purposes when that defendant joined and/or aided the organization. 291 F.3d at 1023-24. By contrast, the majority's approach requires no proof of an intent to further Hamas's activities; so long as a donor to Hamas or its affiliate knows that Hamas engages in terrorism, the donor is liable for any terrorist act committed by Hamas against an American citizen regardless of the purpose behind the donation.

The majority suggests that the rule of *Claiborne Hardware* does not apply because violence is a stated

goal of Hamas rather than something a few rogue members happen to engage in without its approval.

The defendants in the present case could not be held liable for acts of violence by members of Hamas that were not authorized by Hamas.... But as Hamas engages in violence as a declared goal of the organization, anyone who provides *material* support to it, knowing the organization's character, is punishable ... whether or not he approves of violence.

Ante at 700 (emphasis in original). But this holding is directly contrary to *Claiborne Hardware,* which requires proof of a defendant's intent to further violence even when violence is a goal that the organization embraces. *See* 458 U.S. at 920, 102 S.Ct. at 3429 ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals *and* that the individual held a specific intent to further those illegal aims.") (emphasis added). *See Scales v. United States,* 367 U.S. 203, 229, 81 S.Ct. 1469, 1486, 6 L.Ed.2d 782 (1961) (individual may be convicted for active membership in organization that advocates violent overthrow of U.S. government so long as there is "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' ") (quoting *Noto v. United States,* 367 U.S. at 299, 81 S.Ct. at 1522); *see also Communist Party of Indiana v. Whitcomb,* 414 U.S. 441, 447-49, 94 S.Ct. 656, 661-62, 38 L.Ed.2d 635 (1974) (government may not forbid advocacy of lawbreaking or use of force unless it is inciting imminent lawless action) (citing

Brandenburg v. Ohio, 395 U.S. 444, 447-48, 89 S.Ct. 1827, 1829-30, 23 L.Ed.2d 430 (1969)); *Elfbrandt v. Russell,* 384 U.S. 11, 15-18, 86 S.Ct. 1238, 1240-41, 16 L.Ed.2d 321 (1966). Certainly I agree that someone who gives money or other support to Hamas knowing that it *will* be used for terrorist activity-a violation of section 2339A(a)-can be held civilly liable for that activity, but in that case one's intent could readily be inferred. But to impose liability based on aid that may have been given-and, in fact, used-for humanitarian purposes is to do exactly what *Claiborne Hardware* proscribes: punish the supporter "for his adherence to [an organization's] lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." 458 U.S. at 919, 102 S.Ct. at 3429 (quoting *Noto*).

Given that the majority's analysis requires no proof of that any of the defendants intended to support Hamas's terrorism, it is inconsistent with the Supreme Court's First Amendment jurisprudence. Although the majority suggests that an intent requirement would, as a practical matter, eliminate donor liability except in those few cases where a donor declared his intent to support terrorism, *ante* at 698, that certainly is not true in other areas of the law where proof of a defendant's intent is required. As we often note in employment discrimination and a wide variety of other cases, there is rarely direct proof of a defendant's intent, and yet intent can be proved circumstantially. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 141, 120 S.Ct. 2097, 2105, 147 L.Ed.2d 105 (2000) (age

discrimination); *Amrhein v. Health Care Serv. Corp.*, 546 F.3d 854, 858 (7th Cir.2008) (Title VII retaliation); *United States v. Roberts*, 534 F.3d 560, 571 (7th Cir.2008) (wire fraud); *United States v. Patterson*, 348 F.3d 218, 225-26 (7th Cir.2003) (narcotics conspiracy), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Toushin v. Comm'r of Internal Revenue*, 223 F.3d 642, 647 (7th Cir.2000) (tax fraud); *United States v. Rose*, 12 F.3d 1414, 1417, 1420 (7th Cir.1994) (aiding and abetting the transportation and receipt of a stolen motor vehicle). Moreover, should there be evidence that a defendant has made statements in support of the use of violence to achieve political ends, relying on such statements as proof that the defendant provided financial or other aid to a terrorist organization with the intent to support its terrorist activities would not, as the majority suggests, ante at 698-99, pose a First Amendment problem. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489, 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436 (1993) ("The First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

5.

Finally, the majority treats Dr. Paz's affidavit as sufficient evidence that Hamas was responsible for David Boim's murder. Although the majority recognizes that Paz relied on a variety of unauthenticated electronic and documentary sources

for his conclusion, it nonetheless deems his affidavit admissible and sufficient to sustain summary judgment for the plaintiffs on this point because an expert is free in forming his opinion to rely on evidence that would not be admissible in court. *Ante* at 704. But the panel's principal point was that Dr. Paz's conclusion as to who killed David Boim is meaningless without reference to the websites and documents that he so heavily relied upon in forming his opinion, and yet allowing Paz to recount what those sources say without establishing their authenticity and trustworthiness would contradict the basic requirement that expert opinion have "a reliable foundation," *Daubert v. Merrell Dow Pharmaceuticals, supra,* 509 U.S. at 597, 113 S.Ct. at 2799; *see also* Fed.R.Evid. 703. Paz's opinion is based exclusively on what these websites and documents say; he has no personal knowledge of who killed David Boim. So if these sources are not genuine or say something other than what he has represented, then his opinion is worthless. No expert worth his salt would base his opinion on internet and documentary sources without assuring himself that they are reliable-that a website thought to be a Hamas site is, in fact, a website controlled by Hamas and authorized to make representations on its behalf, for example, or that what purports to be the written judgment of a foreign tribunal is actually that. But Paz's affidavit does not describe any such efforts that he made, and there is no other evidence in the record that establishes the authenticity and reliability of the websites and documents whose contents he recounts.

The glaring lack of any information confirming the authenticity and accuracy of Paz's sources raises obvious doubts about the reliability of his opinion. To cite just a few examples: For the proposition that Hinawi killed David Boim, Paz relies on a document in Arabic that purports to be the written judgment reflecting Hinawi's conviction and sentence before a Palestinian Authority tribunal, along with the notes of a U.S. State Department employee who observed Hinawi's trial. Here is the cover letter accompanying and describing both the trial notes and the judgment (Figure 1), followed by the judgment form (Figure 2):

Figure 1: Cover letter

CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

Jerusalem

March 3, 1999

The following is the summary of the trial proceedings held in open court, of the Security Court of the Palestinian Authority of Angad Hamed. The trial was attended by U.S. Consulate General officer Mr. Abdulmuez Zidouk. He is a U.S. Foreign Service Officer who is fully fluent in the Arabic language. The entire trial was conducted in Arabic. This summary is not a verbatim transcript or edited record of the trial as we have no employment or training to accept full court reporting. It is the best of his ability, as perceived and heard at that time, from his position during the court sessions.

Attached are the English language version of the trial notes and the Arabic language copy of the verdict as provided to the Consulate General by the prosecutor's office of the Palestinian Authority.

BO 001350

BEST AVAILABLE COPY

Figure 2: Hinawi Judgment

No translation of the Arabic-language judgment has been provided (it could be an advertisement for all I know), and neither the judgment nor the notes of the foreign service officer have been authenticated in any meaningful way by the cover letter, which does not even identify the letter's author. We have absolutely no way to know, given the current state of the record, whether these documents are what Paz says they are, and thus no way of assessing the reliability of his conclusions. As a final example, here is one of the web pages Paz relied on as evidence that Hamas took responsibility for David Boim's murder:

Figure 3: web page

The selective translation obviously makes it

impossible for the reader to independently evaluate the context and meaning of what Paz is relying on. Notwithstanding these infirmities, the majority is content not only to deem Paz's opinion admissible, but to sustain the entry of summary judgment against the defendants on this point. The defendants cannot be faulted for failing to refute Paz's conclusions, *see ante* at 704-05, for the party opposing summary judgment is not required to rebut factual propositions on which the movant bears the burden of proof and that the movant has not properly supported in the first instance. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 2557, 91 L.Ed.2d 265 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE & PROCEDURE § 2727 (2d ed.1983)); *L & W, Inc. v. Shertech, Inc.*, 471 F.3d 1311, 1318 (Fed.Cir.2006); *Black v. M & W Gear Co.*, 269 F.3d 1220, 1238 (10th Cir.2001). In any other sort of case, this sort of sloppiness would not be tolerated, and we certainly would not sustain the entry of summary judgment based on such shaky evidence.[FN8]

> FN8. One of the other concerns the panel noted was the lack of a foundation for attributing the representations on various websites regarding David Boim's murder to Hamas. 511 F.3d at 753. If that seems like nitpicking, consider the following: Octavia Nasr, "bin Laden hacked?", AC360, http:// ac 360. blogs. cnn. com/ 2008/ 10/ 23/ bin- laden-hacked/ (last visited 11/25/2008).

6.

The murder of David Boim was an unspeakably brutal and senseless act, and I can only imagine the pain it has caused his parents. Terrorism is a scourge, but it is our responsibility to ask whether it presents so unique a threat as to justify the abandonment of such time-honored tort requirements as causation. Our own response to a threat can sometimes pose as much of a threat to our civil liberties and the rule of law as the threat itself. *See, e.g., Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The panel's opinion in *Boim II* took a conservative approach, fully consistent with precedent, that insisted on proof that the defendant's actions were a cause of Hamas's terrorism, proof that the defendants intended to support terrorism, and admissible evidence to support such basic factual points as whether Hamas was responsible for David Boim's murder. This en banc court, by contrast, relieves the plaintiffs of all of these obligations, following a path that portends sweeping liability for those individuals and groups who give their support to the humanitarian activities and affiliates of terrorist organizations but who may have no intent to support terrorism and whose actual link to terrorism has never been evaluated by a factfinder. I stand by the approach taken by the *Boim I* and *Boim II* panel.

7.

For all of the reasons set forth above and in the panel's *Boim II* opinion, I would remand for further

proceedings as to all four defendants, including Salah. I would require the plaintiffs on remand to demonstrate that any financial or other support the defendants have given to Hamas and Hamas-affiliated entities was in some way a cause of Hamas's terrorism. I would also insist the plaintiffs set forth a more complete evidentiary foundation for the proposition that Hamas killed David Boim.

WOOD, Circuit Judge, concurring in part and dissenting in part.[FN1]

> FN1. Judge Rovner and Judge Williams join this opinion except with respect to Salah's liability.

This is a heart-breaking case. No parent can fail to empathize with Joyce and Stanley Boim, who lost their son to the evil of terrorism just as he was on the brink of all of life's promise. Nothing can bring David Boim back, but the Boims have taken advantage of a statute that Congress passed that was designed to provide some degree of accountability for those who commit such awful acts. See 18 U.S.C. § 2333(a). In *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000 (7th Cir.2002) ("*Boim I*"), this court decided that the set of possible defendants in such an action includes not only the direct actors (here, Amjad Hinawi and Khalil Tawfiq Al-Sharif) and the organization to which they belonged and that directed their actions (here, said to be Hamas), but also organizations that aid and abet the former two. When all is said and done, the *en banc* majority has reaffirmed the latter

ruling, though it does so under a slightly different rubric. But, in our zeal to bring justice to bereaved parents, we must not lose sight of the need to prove liability on the facts that are presented to the court. Assumptions and generalizations are no substitute for proof. Particularly because, unfortunately, this probably will not be the last case brought by a victim of international terrorism, it is crucial that we be as clear as we can in fleshing out the statutory requirements and that we do not rush to judgment. Because I do not agree with the majority's articulation and application of some of the governing legal standards, and I find too many central facts to be in dispute, I am still of the view that this case needs to be remanded for further proceedings.

I begin, however, by underscoring that I agree with the *en banc* majority's analysis on a number of points. First, throughout the proceedings before this court, we have unanimously rejected the district court's decision to give collateral estoppel effect to the findings in the case that was litigated in the District of Columbia, *Holy Land Found. for Relief & Dev. v. Ashcroft,* 219 F.Supp.2d 57 (D.D.C.2002), affirmed, 333 F.3d 156 (D.C.Cir.2003) (" *HLF v. Ashcroft* "). See *Boim v. Holy Land Foundation for Relief and Dev.,* 511 F.3d 707, 720-33 (7th Cir.2007) (" *Boim II* "). We all agree that it was error to grant summary judgment in favor of the plaintiffs against the Holy Land Foundation for Relief and Development ("HLF"), and that further proceedings are required. Second, under the new analysis that the *en banc* majority has undertaken, which uses "a chain of explicit statutory incorporations by

reference,"*ante,* at 690, it was error to grant summary judgment in favor of the plaintiffs against Muhammad Salah. Again, we all agree that there are problems with Salah's part of the case. The *en banc* majority is reversing the finding of liability outright because Salah could not have rendered material support to Hamas between the effective date of 18 U.S.C. § 2339A, September 13, 1994, and the date of David Boim's murder, May 13, 1996, because he was in Israeli custody between January 1993 and November 1997. *Ante,* at 691.In fact, the *Boim II* panel majority took a less absolute approach. It found that the district court erred in concluding that Salah's liability could be established only by showing that (1) he knew of Hamas's terrorist activities, (2) he desired to help those activities succeed, and (3) through his participation in the Hamas conspiracy, acts of co-conspirators sufficed to show that he engaged in some act of helping to bring about Boim's murder. Rather than reversing outright, as the *en banc* majority has done, the *Boim II* panel majority would have reversed the summary judgment in the plaintiffs' favor and remanded to give plaintiffs the opportunity to identify "evidence that would permit a reasonable factfinder to find that Salah's actions on behalf of Hamas in some way caused or contributed to David Boim's death." *Boim II,* 511 F.3d at 748.

I am persuaded by the *en banc* majority's statutory analysis that the correct result is reversal of the finding against Salah, rather than a remand for further proceedings. Its careful exegesis of the way that the governing statutes in this area work

together demonstrates why the furnishing of material assistance is a ground for liability under 18 U.S.C. § 2333. I thus do not dissent from the *en banc* court's decision that the judgment against Salah must be reversed.

It is the *en banc* majority's analysis of the cases against the Quranic Literacy Institute ("QLI") and the American Muslim Society ("AMS") (along with the Islamic Association of Palestine) that I find problematic. I continue to believe that the decisions in *Boim I* and *Boim II* correctly found that Congress intended, in passing 18 U.S.C. § 2333, to create an intentional tort, that it meant to "extend civil liability for acts of international terrorism to the full reaches of traditional tort law," *Boim I*, 291 F.3d at 1010, that nothing in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), suggests that Congress lacks the power to do so when it wishes, and finally that § 2333 does impose secondary liability on those who aid and abet acts of terrorism. The *en banc* majority expresses doubts about this holding, although in the end it neither adopts it nor rejects it. Instead, it turns to "an alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333." *Ante*, at 690.

Working through a chain of statutes-from § 2333(a) (treble damages action for person injured by an act of international terrorism), to § 2331(1) (definition of international terrorism), to § 2339A (providing material support for something that violates a

federal criminal law is itself a crime), to § 2332 (criminalizing the killing of any American citizen outside the United States)-the *en banc* majority concludes that there is *primary* liability under § 2333(a) for someone who donates money "to a terrorist group that targets Americans outside the United States." *Ante,* at 690.The *en banc* majority then establishes several criteria for the claim it has recognized: (1) it is the fact of contributing to a terrorist organization, not the amount of the contribution, that is the key to liability, *ante,* at 691; and (2) there is a knowledge requirement, to the effect that the donor-defendant must have known that the money would be used "in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad." *Ante,* at 691. At that point, however, the *en banc* majority announces that its theory does not establish primary liability after all-instead, a claim based on material support "has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors." *Id.*

I would have thought that this was exactly the conclusion that the *Boim I* panel reached. By labeling its theory as one of primary liability, the *en banc* majority is apparently trying to reap the advantages of both kinds of theories. It acknowledges that in order to prove a primary liability case, the plaintiffs would need to establish "the ordinary tort requirements relating to fault, state of mind, causation, and foreseeability." *Ante,* at

692. But, it says, those requirements do not apply here, because "functionally the primary violator is an aider and abettor or other secondary actor." *Ante,* at 692.

I believe that the following is a fair summary of the formal requirements that the *en banc* majority has announced for proving a case under § 2333:

1. Act requirement: the defendant must have provided material assistance, in the form of money or other acts, directly or indirectly, to an organization that commits terrorist acts.

2. State of mind requirement: the defendant must either know that the donee organization (or the ultimate recipient of the assistance) engages in such acts, or the defendant must be deliberately indifferent to whether or not it does so.

3. Causation: there is no requirement of showing classic "but-for" causation, nor, apparently, is there even a requirement of showing that the defendant's action would have been sufficient to support the primary actor's unlawful activities or any limitation on remoteness of liability.

There is little to criticize in the first of these criteria, *as an abstract matter.* The second may also pass muster, *again as an abstract matter.* For both of these, my problem with the *en banc* majority's opinion lies more in the way that they are applied to these facts, as I explain further below, than in their formal scope. With respect to the third requirement,

there is both a theoretical problem and a problem with the application, and so I begin with that.

The *en banc* majority asserts that its position on causation is supported by a number of cases that it discusses. Those cases, however, do not go as far as the *en banc* majority claims, nor am I familiar with anything else in the law of torts that does so. It is important here to be precise once again about areas of agreement and areas of disagreement. The *en banc* majority is quite right to point out that literal "but-for" causation cannot be shown in certain cases, and in those cases, the courts have accepted substitutes for the "but-for" showing. Thus, in the case where there are two independent acts, and either one alone would have brought about the injury, a defendant who was responsible for one of those acts cannot defeat liability by pointing out that the other one would have been enough to create the harm by itself. That is the principle illustrated by *Kingston v. Chicago & N.W. Ry. Co.*, 191 Wis. 610, 211 N.W. 913 (1927), discussed in our decision in *Maxwell v. KPMG LLP*, 520 F.3d 713, 716 (7th Cir.2008). It is also the principle endorsed by the most recent draft of the American Law Institute's Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm, § 27 ("Restatement (Third) of Torts"), which says "[i]f multiple acts occur, each of which alone would have been a factual cause under § 26 of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." This is a far cry from saying that cause need not be proven if there are multiple sufficient causes; the ALI's draft

acknowledges simply that some harms may be overdetermined, and in those cases, cause can be proven by demonstrating that the defendant's tortious conduct was sufficient to produce the harm. *Maxwell*, cited by the *en banc* majority, illustrates this principle as well as anything: "There are also cases in which a condition that is not necessary, but is sufficient, is deemed the cause of an injury, as when two fires join and destroy the plaintiff's property and each one would have destroyed it by itself and so was not a necessary condition; yet each of the firemakers (if negligent) is liable to the plaintiff for having 'caused' the injury." 520 F.3d at 716. The key word here is "sufficient": the plaintiff cannot win without showing that the defendant's act would have been sufficient to cause the injury, even though it may be the case that other acts might also have been sufficient.

The other examples the *en banc* majority uses fit the rule articulated in Restatement (Third) § 27. Thus, if there were two wrongful causes and a third innocent one (two arsonists plus a lightning strike, for example), any of which would have caused the injury at issue, the person responsible for one of the wrongful acts cannot take refuge in the fact that other sufficient causes were also present. Or if, as in the classic case of *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), there are two possible causes, either of which would have been sufficient to cause the harm (a bullet from each of two guns, either one of which would have sufficed to harm the third party), once again *sufficient* cause has been proven even if *necessary* cause cannot be. Ditto with the *en*

banc majority's example of several firms that spill toxic waste that finds its way into groundwater and damages property. Even if the damage is slight, that wrongful act is sufficient for liability. Any remaining uncertainties can be resolved through rules on apportionment of damages.

In the end, the *en banc* majority is reduced to relying on a case where a roomful of junior high school students erupted into a melee and a bystander student was seriously hurt. See *Keel v. Hainline,* 331 P.2d 397 (Okla.1958). A closer look at the facts of that case is useful. Approximately 35 to 40 students were in their music classroom one day, but because the instructor failed to show up on time, they were unsupervised for about a half hour. Here is the court's description of what unfolded:

During the absence of the instructor, several of the male students indulged in what they termed "horse play". This activity consisted of throwing wooden blackboard erasers, chalk, cardboard drum covers, and, in one instance, a "coke" bottle, at each other. It appears that two or three of the defendants went to the north end of the class room and the remaining defendants went to the south end of the room. From vantage points behind the blackboard on the north end and the piano on the south end, they threw the erasers and chalk back and forth at one another. This activity was carried on for a period of some 30 minutes, and terminated only when an eraser, thrown by defendant [Larry] Jennings, struck plaintiff in the eye, shattering her eye glasses, and resulting in the loss of the use of such eye. 331 P.2d

at 398-99. The defendants to whom the court refers were six boys-two or three at one end of the room, the rest at the other end of the room. Robert Keel, the plaintiff-in-error, was in one of those groups-the facts do not mention whether Keel was on Jennings's "team" or the other one. The court first found that what it characterized as "the willful and deliberate throwing of wooden blackboard erasers at other persons in a class room containing 35 to 40 students" was wrongful conduct, because it amounted to an assault and battery. *Id.* at 399. The intent of the actors was immaterial. Addressing Keel's argument that there was no evidence that he aided or abetted Jennings in the final throw that injured the plaintiff, the court said:

It is undisputed that defendant Keel participated in the wrongful activity engaged in by the other defendants of throwing wooden blackboard erasers at each other back and forth across a class room containing 35 to 40 students, although most of the testimony indicates that defendant Keel's participation was limited to the retrieving of such erasers and handing them to other defendants for further throwing. Keel aided and abetted the wrongful throwing by procuring and supplying to the throwers the articles to be thrown. It is immaterial whether defendant Keel aided, abetted or encouraged defendant Jennings in throwing the eraser in such a manner as to injure Burge, or not, since *it is virtually undisputed that defendant Keel aided, abetted or encouraged the wrongful activity of throwing wooden erasers at other persons,* which resulted in the injury to Burge.

331 P.2d at 400 (emphasis added). The *en banc* majority reads this as a holding that Keel was liable "even though there was no proven, or even likely, causal connection between anything he did and the injury." *Ante,* at 697. But that reading entirely ignores the perspective that the Oklahoma court adopted. Keel and the other five boys jointly created a dangerous situation in the classroom. By acting together, they greatly enhanced the risk of harm to the other students in the room. So viewed, there is a readily observable causal link between the collective action of the six boys and the harm the plaintiff suffered. Whether we call Keel's contribution "material support" or something else does not matter-the point here is that the Oklahoma court did not dispense with the requirement of proving causation.

So, too, must we insist on proof that QLI's and AMS's actions amounted to at least a sufficient cause of the terrorist act that killed David Boim, even if, on these facts, there were multiple such causes. The *Boim II* panel majority opinion outlines ways in which this might be done. I would summarize these approaches to the causation element as follows: there must be proof (1) that the actual recipient organization received a non-trivial amount of money from either QLI or AMS, and (2) that the recipient was, itself, sufficiently affiliated with Hamas that those dollars indirectly supported Hamas's terrorist mission. Because money is fungible, the combination of the link to Hamas and the receipt of an amount that would have been sufficient to finance the

shooting at the Beit El bus stop would be enough to show that the "material assistance" of giving money caused the terrorist act that took David Boim's life. (There is no allegation here that either QLI or AMS directly funneled money to Hamas; had there been, this obviously would have sufficed as well.)

Another reason why I find it ill-advised to exempt plaintiffs suing under § 2333 on a "material assistance" theory from showing causation is that this approach also appears to eliminate the need to show what was classically called "proximate cause." As the Proposed Final Draft to the Restatement (Third) of Torts points out, that term is imprecise at best. See Restatement (Third) of Torts, ch. 6, Special Note on Proximate Cause. The new Restatement refers to this concept as "scope of liability," in recognition of the fact that "[t]ort law does not impose liability on an actor for all harm factually caused by the actor's tortious conduct." *Id.* At some point, the harm is simply too remote from the original tortious act to justify holding the actor responsible for it. It may be the case that the boundaries of liability are wider for intentional torts, see Restatement (Third) of Torts § 33, but that does not mean that they are limitless. In part, this reflects the reality that as the temporal or factual chain between the tortious act and the harm becomes ever longer, the likelihood of intervening or superseding causes becomes greater. See generally Restatement (Third) of Torts § 34. The *en banc* majority freely concedes that there are no limits at all to its rule, and that a donor who gave funds to an organization affiliated with Hamas in 1995 might

still be liable under § 2333 half a century later, in 2045. I see no warrant for assuming that § 2333, unlike the rest of tort law, contains no scope-of-liability limitations. I note as well that such an open-ended rule would be in serious tension with the general four-year statute of limitations Congress has passed for civil actions based on statutes passed after 1990 (like this one). See 28 U.S.C. § 1658.

The scope of the causation element is not my only concern about the *en banc* majority's opinion. My other problem is with its application of the principles that, at a high level of generality, state the law correctly. As I noted earlier, the plaintiffs must prove that the defendant provided material assistance to an organization that commits terrorist acts. But what does it take to qualify as such an organization? The Boims did not sue Hamas, nor does their case rely on the proposition that QLI or AMS sent money directly to Hamas. We must decide how far down the chain of affiliates, in this shadowy world, the statute was designed to reach, and how deeply Hamas must be embedded in the recipient organization. QLI and AMS argue strenuously that at worst they sent money to charitable organizations with some kind of link to Hamas. Some might have been analogous to wholly owned subsidiaries; some might have been analogous to joint ventures; some might have been independent entities that accepted funding from Hamas as well as other more reputable organizations. The record throws little light on these matters, because the district court thought them irrelevant. As I understand the *en banc* majority opinion, it is saying that even if an independent day

care center receives $1 from organization H known to be affiliated with Hamas, not only the day care center but also anyone who gave to H is liable for all acts of terrorism by Hamas operatives from that time forward against any and all Americans who are outside the United States.

That is a proposition of frightening, and I believe unwise, breadth. The *en banc* majority has tried to carve out humanitarian non-governmental organizations like the American Red Cross and Doctors Without Borders, which (fortuitously) may also benefit from a "medical services" exemption in the statute. But I am not sure that it has succeeded. Those worthy organizations are not the only ones committed to nondiscriminatory treatment of all needy human beings. The United Nations High Commissioner for Refugees sponsors many programs designed to assist people in war-torn areas. The United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA") has been in existence since 1950. See http:// www. unhcr. org/ partners/ PARTNERS/ 48 fdeced 20. html (last visited November 11, 2008). It describes itself as "the main provider of basic services-education, health, relief and social services-to over 4.1 million registered Palestine refugees in the Middle East."*Id.* The odds are strong that some of the agencies that UNRWA helps may also receive assistance from Hamas. The *en banc* majority does not tell us whether, if QLI or AMS also happens to give money to such an agency, the donor has violated § 2333 by doing so.

The *en banc* majority also slides over the statutory requirement (derived from its chain of statutory connections) that the entity providing material assistance must know that the donee plans to commit terrorist acts against U.S. citizens. *Ante,* at 691-92, 693. All that is necessary, we are told, is that a donor [to Hamas-and presumably to another organization with an adequate link to Hamas, whatever that may be] who knew the aims and activities of the organization [only Hamas? or the affiliated recipient?]-would know that Hamas was gunning for Israelis, that Americans are frequent visitors to and sojourners in Israel, that some Israeli citizens have U.S. citizenship as well, and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel.

Ante, at 693-94. This is awfully vague. Americans travel, and are known to travel, to every country on the face of the globe-they even go to places like Antarctica that are not even countries. If one could, it would be more realistic and sound as a legal matter simply to hold that it makes no difference whether or not the terrorist acts that the organization commits are directed toward Americans. The only problem with such a holding-which otherwise would be a routine application of the doctrine of transferred intent-is that the statutory basis for a tort action under § 2333 depends upon a finding that the material support violated U.S. federal criminal law, and that here the crime in question is the killing of an American citizen outside the United States. In my view, given

the language of the statutes that Congress has passed thus far, we are required to take a more restricted view of § 2333. A statute focusing on extraterritorial killings of Americans would still be a strong tool against terrorist activities and organizations that threaten vital U.S. interests. Al Qaeda, for example, trumpets its intent to target Americans whenever and wherever it can. If the plaintiffs could show both that Hamas has done the same thing and further that Hamas's intent should be attributed to the donee organization (recalling once again that neither QLI nor AMS gives money directly to Hamas), then a § 2333 claim may proceed; otherwise, it may not. Put differently, I find it difficult to read § 2333 as creating a claim against an organization that has, in effect, declared war on the entirety of civilization.

The *Boim II* opinion explains the problems with a finding, on the present record, that Hamas was indeed responsible for David Boim's murder. That finding rests entirely on the affidavit submitted by Dr. Reuven Paz. The majority accepts that affidavit as adequate, noting only the uncontroversial point that experts are allowed to rely on hearsay and other inadmissible evidence. See FED.R.EVID. 703 (expert may rely on facts or data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"). No one doubts this. The panel's point in *Boim II* was that, at least since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and the revision of FED. R. EVID. 702, there must nevertheless be a solid foundation for the expert's

opinion. Rule 702 puts the point this way: the expert may offer an opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." It is these threshold criteria that are at issue. No one is saying that these requirements *cannot* be met in this case, or in any other case involving international terrorism. They just have not been satisfied yet, and so QLI and AMS should have won a remand on this basis as well.

For these reasons, I would remand for further proceedings on the claims against QLI and AMS. I concur in the *en banc* majority's opinion insofar as it reverses the judgment against Salah and it remands for further proceedings on the claims against HLF.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-1969, 01-1970

JOYCE BOIM AND STANLEY BOIM, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID BOIM, Plaintiffs-Appellees,

v.

QURANIC LITERACY INSTITUTE AND HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, Defendants-Appellants.

Argued Sept. 25, 2001 - Decided June 5, 2002

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

ROVNER, Circuit Judge.

In this case of first impression, the parents of a young United States citizen murdered in Israel by Hamas terrorists have sued several individuals and organizations for the loss of their son. Two of the organizational defendants moved to dismiss the complaint, and the district court denied the motion. In this interlocutory appeal, we are asked to consider the viability of a claim brought under the never-tested 18 U.S.C. § 2333, which allows U.S. nationals

who have been injured "by reason of an act of international terrorism" to sue therefor and recover treble damages. We affirm the district court's denial of the defendants' motion to dismiss.

I.

We derive the facts from the allegations of the complaint. At this stage of the proceedings, we must accept these allegations as true, extending to the plaintiffs the benefit of every reasonable inference that may be drawn from the complaint. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Slaney v. The International Amateur Athletic Federation,* 244 F.3d 580, 597 (7th Cir.2001), *cert. denied*, 534 U.S. 828, 122 S.Ct. 69, 151 L.Ed.2d 35 (2001); *Camp v. Gregory,* 67 F.3d 1286, 1290 (7th Cir.1995), *cert. denied*, 517 U.S. 1244, 116 S.Ct. 2498, 135 L.Ed.2d 190 (1996). We may affirm the dismissal of that complaint only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Slaney,* 244 F.3d at 597.

David Boim was the son of Joyce and Stanley Boim, who are United States citizens. David held dual citizenship in the United States and Israel. In 1996, the Boims were living in Israel, where seventeen-year-old David was studying at a yeshiva. On May 13, 1996, David was murdered as he waited with other students at a bus stop near Beit El in the West Bank. He was struck by bullets fired from a passing

car, and was pronounced dead within an hour of the shooting. His two attackers were later identified as Amjad Hinawi and Khalil Tawfiq Al-Sharif. The Palestinian Authority apprehended Hinawi and Al-Sharif, and temporarily imprisoned them in early 1997. They were released shortly thereafter, apparently pending trial. Al-Sharif subsequently killed himself and five civilians and injured 192 other people in a suicide bombing in Jerusalem on September 4, 1997. Two other suicide bombers joined him in this action. Hinawi, who confessed to participating in the shooting of David Boim, was eventually tried for David's murder by a Palestinian Authority court and was sentenced to ten years' imprisonment on February 17, 1998.

Both Hinawi and Al-Sharif were known members of the military wing of Hamas. The Boims describe Hamas as an extremist, Palestinian militant organization that seeks to establish a fundamentalist Palestinian state. The group is divided into two branches, one political and one military. The military branch receives orders and material support from the political branch. Hamas seeks to advance its political objectives through acts of terrorism and works to undermine the Middle East peace process through violent attacks on civilians. Hamas has a global presence, and terrorist operatives in Gaza and the West Bank receive their instructions, funds, weapons and practical support for their missions from Hamas organizers throughout the world. The Boims believe that Hamas has command and control centers in the United States, Britain and several Western

European countries. The leaders of these control centers coordinate fund-raising efforts from sympathetic parties in these various countries and then launder and channel the money to Hamas operatives in Gaza and the West Bank. They also arrange for the purchase of weapons and for the recruitment and training of military personnel. They work with local commanders in the West Bank and Gaza to plan terrorist attacks. Hamas was designated a terrorist organization by President William Jefferson Clinton in 1995 by Executive Order.[FN1] In 1997, Hamas was designated a foreign terrorist organization pursuant to 8 U.S.C. § 1189.[FN2]

FN1. Exec. Order No. 12947, 60 Fed.Reg. 5079 (January 23, 1995). President Clinton invoked 50 U.S.C. § 1701, et seq. (the International Emergency Economic Powers Act), 50 U.S.C. 211601 et seq. (the National Emergencies Act), and 3 U.S.C. § 301 (authorizing the President to delegate certain functions) to label Hamas and eleven other groups as "terrorist organizations which threaten to disrupt the Middle East peace process."

FN2. Section 1189 provides a procedure by which the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, may designate certain organizations as "foreign terrorist organizations." In order to be so designated, a foreign organization must "engage in terrorist activity" as defined in 8 U.S.C. § 1182(a)(3)(B).

"Terrorist activities" include a number of illegal acts such as sabotaging or highjacking a vessel, aircraft or vehicle; detaining a person and threatening to kill, injure or further detain that person in order to compel a third person to do something; violently attacking an internationally protected person; assassinating any person; using a biological agent, chemical agent, nuclear device, explosive or firearm with intent to endanger the safety or one or more persons or to cause substantial damage to property; or threatening, attempting or conspiring to do any of these things. 8 U.S.C. § 1882(a)(3)(B)(ii). "Engage in terrorist activity" is further defined to include providing material support to anyone conducting a terrorist act, where material support includes: preparation and planning of a terrorist activity; gathering of information on potential targets for terrorist activity; providing a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity; soliciting funds or other things of value for any terrorist organization; or soliciting any individual for membership in a terrorist organization or to engage in terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(iii). After notifying Congress of the designation, the Secretary of the Treasury may require United States financial institutions to freeze

> the assets of a foreign terrorist organization. The statute provides that Congress may revoke the designation in certain circumstances and also provides that any foreign terrorist organization may seek judicial review of the designation. 8 U.S.C. § 1189.

The Boims allege that Hamas' military wing depends on foreign contributions, with approximately one-third of its multi-million dollar annual budget coming from fund-raising in North America and Western Europe. The Boims believe that the Quranic Literacy Institute ("QLI") and the Holy Land Foundation for Relief and Development ("HLF"), along with other defendants not involved in this appeal, are the main fronts for Hamas in the United States. They allege that these organizations' allegedly humanitarian functions mask their core mission of raising and funneling money and other resources to Hamas operatives in support of terrorist activities.

QLI is an Illinois not-for-profit corporation that purports to translate and publish sacred Islamic texts, but the Boims believe it is also engaged in raising and laundering money for Hamas. QLI also employed another defendant, Mohammed Abdul Hamid Khalil Salah, nominally as a computer analyst. The FBI has seized $1.4 million in cash and property from Salah, who is the admitted United States based leader of the military branch of Hamas. He has been prosecuted for channeling money to Hamas and for recruiting, organizing and training

terrorist operatives in Israel. Salah is named on a list of Specially Designated Terrorists compiled by the United States Treasury Department's Office of Foreign Assets Control.[FN3]

> FN3. The United States has proceeded against Salah and Mousa Mohammed Abu Marzook in an unrelated action to seize funds used in terrorism. *See United States v. One 1997 E35 Ford Van VIN 1FBJS31L3VHB70844,* 50 F.Supp.2d 789 (N.D.Ill.1999). In that action, the United States has alleged that Salah and Marzook employed a number of charitable organizations in the United States to raise and launder money for Hamas. The FBI presented evidence in that action that Salah actively recruited Hamas terrorists, arranged for and financed their training, served as a financial conduit for Hamas operations directed from the U.S., paid for plane tickets to transport terrorists from the U.S. to the Middle East, and gave approximately $100,000 to another Hamas operative for the express purpose of procuring weapons.

HLF is also a not-for-profit corporation, whose ostensible mission is to fund humanitarian relief and development efforts. HLF's director has acknowledged providing money to Hamas, and the Boims allege that, although HLF purports to have a charitable purpose, its true function is to raise and channel money to Hamas for terrorist activities. The U.S. base of HLF's operations is in Texas. HLF also has offices in Jerusalem and in Illinois. HLF, QLI and the other organizational defendants are linked

by interlocking directorates and by ties to Salah and Mousa Mohammed Abu Marzook, another individual defendant (not involved in this appeal) who has a leadership role in the military branch of Hamas.[FN4]

> FN4. According to the Boims, Marzook has admitted in an extradition proceeding filed against him that he is the leader of the political wing of Hamas and he has raised money for Hamas. Evidence presented in his extradition proceeding established that he transferred funds to Salah, recruited Salah to raise funds for the Hamas military activities, knew that Hamas operatives were carrying out terrorist activities in Israel, and gave one of the organizers of these terrorist activities a book of blank, signed checks to fund Hamas operations. The United States has also proceeded against Marzook in the *Ford Van* forfeiture action referenced in note 3, *supra*.

According to the Boims, money flows from American contributors to Hamas in a three-step process: first, the front organizations solicit contributions; second, the leaders arrange for the money to be laundered and wired overseas; and third, Hamas operatives in Gaza and the West Bank use the money to finance terrorist activities. Because it is illegal to provide financial support to recognized terrorist groups, the money flows through a series of complicated transactions, changing hands a number of times, and being commingled with funds from the front organizations' legitimate charitable and business dealings. The funds are laundered in a variety of

ways, including through real estate deals and through Swiss bank accounts. The Boims allege that money raised by HLF and QLI was transferred to Hamas terrorists using these various methods in order to finance terrorist activities. Hamas used the money raised in this way to purchase weapons to carry out terrorist attacks, including the attack on David Boim. Hamas regularly drew money from a pool of laundered funds in order to finance training, weapons purchases, lodging, false identification, communications equipment, lethal substances, explosives, personnel, transportation and other material support for terrorist operations. The Boims believe that expenditures from this pool of funds paid for the vehicle, machine guns and ammunition used to kill David Boim, and also paid for the training of Hinawi, Al-Sharif and other Hamas operatives involved in the attack on David Boim. The funds were also used to provide a stipend for Al-Sharif's family, as it is a common practice to pay the families of suicide bombers in order to encourage others to volunteer for these activities.

The Boims bring their suit against HLF, QLI and other organizational and individual defendants pursuant to 18 U.S.C. § 2333. They charge that all of the defendants are civilly liable for David's murder. They name Hinawi and Al-Sharif as the persons who actually killed David, but allege that the other defendants aided, abetted and financed Hinawi and Al-Sharif. They assert that the organizational defendants provided material support or resources to Hamas as those terms are defined in 18 U.S.C. §§ 2339A and 2339B. The Boims seek compensation for

the extreme physical pain David suffered before his death, and for the cost of his funeral and the loss of accretion to his estate due to his death at age seventeen. They also seek damages for their own extreme mental anguish and loss of the society of their son. They ask for $100,000,000 compensatory damages, $100,000,000 punitive damages, plus costs and attorney's fees, and request the trebling of damages pursuant to the statute.

In the district court, QLI and HLF moved to dismiss the complaint for failure to state a claim upon which relief may be granted. In particular, the defendants argued that section 2333 does not support a cause of action for aiding and abetting acts of international terrorism, and that the suit is foreclosed by the Supreme Court's ruling in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). Because the defendants believed that aiding and abetting was the sole basis for the Boims' cause of action, they maintained that the complaint should be dismissed. The Boims argued to the district court that their section 2333 complaint could be sustained under any one of three different theories of liability. First, they maintained that providing material support to a terrorist organization was itself an act of international terrorism as defined in section 2331. Second, they argued that the defendants could be held civilly liable under section 2333 because they violated sections 2339A and 2339B, the criminal statutes prohibiting the provision of material support to terrorists.[FN5] Third, they contended that the defendants could be held liable under section

2333 on an aiding and abetting theory, and that the Supreme Court's holding in *Central Bank*, which addressed civil liability for aiding and abetting in the context of securities fraud claims, was distinguishable.

> FN5. The Boims also argued in the district court that Congress clarified section 2331(1) in its later passage of sections 2339A and 2339B. According to the Boims, Congress demonstrated in sections 2339A and 2339B that the provision of material support or resources to terrorists is an activity that *involves* violent acts or acts dangerous to human life. The Boims' argument on this point is thus two-fold: first, they claim that violations of sections 2339A and 2339B give rise to civil liability under section 2333. Second, they maintain that sections 2339A and 2339B clarify the meaning of "involve" in section 2331(1). In particular, sections 2339A and 2339B demonstrate that providing material support or resources is an activity that "involves" violent acts. We will address both prongs of the Boims' argument *infra*.

The district court denied the motion to dismiss. *Boim v. Quranic Literacy Institute*, 127 F.Supp.2d 1002, 1021 (N.D.Ill.2001). Addressing the Boims' first theory, the court found that funding, without more, does not "involve violent acts or acts dangerous to human life." The court began with the statutory language, which sweepingly defines acts of international terrorism to include "activities

involving violent acts or acts dangerous to human life," and found that this phrase was so broad that it provided little guidance concerning where to draw limits on the conduct Congress sought to curb. 127 F.Supp.2d at 1013-14. Instead, "[c]ontributions to a foreign organization ... without a further allegation of participation by the contributor, appear too far removed to constitute direct acts of international terrorism." *Id.* The district court concluded that Congress meant to reach beyond the persons directly involved in the violent act, but that liability should be limited to persons or organizations that knew about the violent act and participated in the preparation of the plan to commit the violent act. 127 F.Supp.2d at 1014-15. Thus, as a matter of statutory interpretation, the Boims' allegations of funding terrorist organizations, without more direct dealing with the group, did not constitute activity involving violent acts or acts dangerous to human life. 127 F.Supp.2d at 1015. Relying on a Fourth Circuit case, the court noted that where funding a terrorist group was the main allegation, the plaintiffs must also be able to show that the defendants providing the funds knew about the violent act and participated in the preparation of the plan to commit the violent act. *See United States v. Wells*, 163 F.3d 889 (4th Cir.1998), *cert. denied*, 528 U.S. 841, 120 S.Ct. 109, 145 L.Ed.2d 92 (1999). Because Salah was alleged to have participated in recruiting and training terrorists as well as channeling money to Hamas for terrorist activities, the court found that the claim against him could stand. 127 F.Supp.2d at 1015. The court found the allegations of funding alone against the

organizational defendants inadequate on a straight reading of the statute because, although the Boims alleged that HLF and QLI knew about Hamas' plans for terrorist activities, they did not allege that these groups participated in the preparation of the planning for the violent acts. *Id.*

The court then considered whether the action could be sustained under the Boims' second theory, that violations of 18 U.S.C. §§ 2339A and 2339B sufficed to create civil liability under section 2333. Sections 2339A and 2339B created criminal liability for persons providing material support to terrorists. The court agreed that conduct prohibited by sections 2339A and 2339B constituted "international terrorism" as that term was defined in section 2333. 127 F.Supp.2d at 1016. The court noted that sections 2339A and 2339B require that support provided to terrorists be both knowing and material, but that civil liability for violations of sections 2339A or 2339B was limited to the period of time after sections 2339A and 2339B became law (1994 for section 2339A and 1996 for section 2339B). 127 F.Supp.2d at 1016-17.

The court also addressed the Boims' closely related theory that Congress clarified the meaning of "acts of international terrorism" when it passed sections 2339A and 2339B. According to the district court, these criminal provisions demonstrated Congress' intent to include the provision of material support to terrorists in its definition of conduct involving violent acts under section 2331. If Congress imposed criminal liability for the provision of material

support to terrorists, the district court reasoned, it surely meant for civil liability to reach at least that far. The court found further support for the proposition that Congress viewed the provision of material support to terrorists as an act of international terrorism in the repeal of jurisdictional immunity of a foreign state that has been designated a state sponsor of terrorism when the state is sued for personal injury or death caused by the state's provision of material support or resources to terrorists as defined in section 2339A. *See*28 U.S.C. § 1605(a)(7). "Considering Congress has permitted foreign states that have been designated state-sponsors of terrorism to be sued in United States courts for violating § 2339A, it is hard to argue that Congress did not intend to include such violations in its definition of 'terrorism' under the statutory scheme." 127 F.Supp.2d at 1016.

Because section 2339A was enacted in 1994 and section 2339B was enacted in 1996, the court found that the plaintiffs would have to rely on their third theory of liability, aiding and abetting in order to reach conduct that occurred before 1994. 127 F.Supp.2d at 1017. The court rejected the defendants' contention that the Supreme Court generally precluded aiding and abetting liability in federal civil causes of action in the *Central Bank* decision. *Id.* Rather, the district court found that aiding and abetting liability was available when a statute provided for it. Section 2333 relies on section 2331(1) for its definition of "international terrorism," and the court found that any action that falls under the definition of section 2331(1) may be the basis for

a civil action under section 2333. Noting that aiding and abetting an act of international terrorism is itself a criminal violation, the court concluded that aiding and abetting terrorism is an activity that involves violent acts or acts dangerous to human life. The court sustained the Boims' cause of action on the theory that they had sufficiently alleged that the defendants aided and abetted international terrorism. 127 F.Supp.2d at 1017-18. The court relied on the liberal standards of pleading under Federal Rule of Civil Procedure 8 to find that the Boims had alleged their claim sufficiently, reasoning that the complaint provided the defendants with adequate notice of the charges against them. 127 F.Supp.2d at 1018.

The district court also rejected the defendants' claim that the Boims had inadequately alleged causation. HLF and QLI argued that the Boims had shown no connection between the defendants' provision of money to Hamas and the murder of David Boim. The defendants characterized the Boims' complaint as alleging funding only through 1993, and maintained the funding was too remote in time to have proximately caused David's murder in 1996. The court first noted that the Boims alleged the defendants' funding extended beyond 1993, contrary to the defendants' characterization. The court also found that Congress indicated by its passage of sections 2339A and 2339B its belief that funding terrorism causes the harm of the terrorists' subsequent actions. 127 F.Supp.2d at 1019. According to the court, sections 2339A and 2339B required that the aid to the terrorists be "material,"

a term that provides the causal link between the provision of funds and the injury from the terrorist action. The court found the complaint sufficient and stated that the plaintiffs would have to prove the funding at issue here was material to David Boim's murder. 127 F.Supp.2d at 1019-20.

Finally, the court rejected the defendants' First Amendment challenge, finding that the complaint was not seeking to impose liability for mere political association or belief but rather for knowing and intentional support of the illegal aims of the defendant organizations. 127 F.Supp.2d at 1020-21. Because the Boims are required to prove that HLF and QLI intended to further Hamas' illegal activities, either by aiding and abetting the terrorist action or by violating sections 2339A or 2339B, the district court found that the claim survived First Amendment scrutiny. *Id.* HLF and QLI appeal.

II.

[1] The district court granted HLF and QLI's motion for a certificate of appealability, and we subsequently granted them leave to file an interlocutory appeal. *See*28 U.S.C. § 1292(b). Interlocutory appeal is appropriate when (1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation, and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed. *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674,

675 (7th Cir.2000). We have interpreted "question of law" to refer to a question regarding the meaning of a statutory or constitutional provision, regulation or common law doctrine. *Id.*, 219 F.3d at 676. In this case, the district court correctly certified three issues for appeal:

(1) Does funding, *simpliciter*, of an international terrorist organization constitute an act of terrorism under 18 U.S.C. § 2331?

(2) Does 18 U.S.C. § 2333 incorporate the definitions of international terrorism found in 18 U.S.C. §§ 2339A and 2339B?

(3) Does a civil cause of action lie under 18 U.S.C. §§ 2331 and 2333 for aiding and abetting international terrorism?

See *Boim v. Quranic Literacy Institute, et al.*, Case No. 00-C-2905, Order (N.D.Ill. February 22, 2001). The interpretation of sections 2331 and 2333 presents questions of law which will control the outcome of this case. As these are questions of first impression, the application of these statutes to the facts alleged here is certainly contestable, and the resolution of these issues will facilitate the conclusion of the litigation. The defendants filed their motions for certificates of appealability in the district court within a reasonable amount of time after entry of the district court's order denying their motion to dismiss (the district court's order was docketed January 10, 2001, QLI filed its motion on February 14, 2001 and HLF filed its motion on

February 15, 2001). A panel of this Court granted the defendants' subsequent petitions for interlocutory appeal on April 6, 2001, and we now consider the issues certified by the district court.

We review *de novo* a district court's ruling on a 12(b)(6) motion to dismiss a complaint for failure to state a claim on which relief may be granted. *Slaney*, 244 F.3d at 597. At this stage of the proceedings, we accept all factual allegations in the complaint and draw all reasonable inferences from those facts in favor of the Boims, the plaintiffs here. *Id.* We examine the complaint as a whole, and we will allow the case to proceed unless it appears beyond doubt that the Boims can prove no set of facts in support of their claim which would entitle them to relief. *Id.*; *Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 839 (7th Cir.1999). Federal Rule 8(a)(2) requires only that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); *Leatherman*, 507 U.S. at 168, 113 S.Ct. 1160. The Boims thus need not set out in detail all of the facts upon which they base their claim. Rule 8(a) requires only that the complaint give the defendants fair notice of what their claim is and the grounds upon which it rests. *Leatherman*, 507 U.S. at 168, 113 S.Ct. 1160. With these standards in mind, we turn to the statutes at issue here.

The Boims seek to recover against HLF and QLI pursuant to 18 U.S.C. § 2333, which provides, in relevant part:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the

United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333(a). "International terrorism," in turn, is a defined term:

[T]he term "international terrorism" means activities that-

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended-

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend

> national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1). These provisions became law in 1992.[FN6] We turn now to the Boims' three theories of liability under section 2333:(1) that funding Hamas, without more, is an act of international terrorism because it is conduct that involves violent acts or acts dangerous to human life; (2) that funding Hamas constitutes the provision of material support or resources to a terrorist organization in violation of the criminal provisions set forth in sections 2339A and 2339B, and that violations of these criminal provisions give rise to civil liability under section 2333; and (3) that aiding and abetting an act of terrorism gives rise to civil liability under section 2333.[FN7]

> FN6. Sections 2331 and 2333 were initially enacted in 1990 as the Anti-Terrorism Act of 1990, Pub.L. No. 101-519, § 132, 104 Stat. 2250 (1990), but were repealed as the result of a technical deficiency. They were subsequently re-enacted as part of the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, 106 Stat. 4506 (1992).

> FN7. Because the questions presented in the appeal implicate, at least in part, the relation between section 2333 and two criminal statutes, sections 2339A and 2339B, we asked

the United States to file a brief *amicus curiae*. The United States accepted our invitation and the plaintiffs and defendants were afforded an opportunity to respond to the views presented by the United States.

A.

[2] The plaintiffs' first theory is that the simple provision of funds to Hamas by QLI and HLF constitutes an act of international terrorism because it "involve[s] violent acts or acts dangerous to human life." The Boims liken payments to Hamas to murder for hire: the person who pays for the murder does not himself commit a violent act, but the payment "involves" violent acts in the sense that it brings about the violent act and provides an incentive for someone else to commit it. The Boims urge us to adopt a very broad definition of "involves" that would include any activity that touches on and supports a violent act. They argue that David's murder was indisputably a violent act, and we have no quarrel with that premise. But they further argue that the provision of money or in-kind services to persons outside the country who set up the infrastructure used to recruit and train David's murderers, buy their weapons, and compensate their families also "involves" violent acts. The defendants, in turn, urge us to read the statute to hold liable only those who actually commit a violent act.

No court has yet considered the meaning or scope of sections 2331 and 2333, and so we write upon a tabula rasa. The starting point in all statutory

analysis is the plain language of the statute itself. *United States v. Wagner*, 29 F.3d 264, 266 (7th Cir.1994). We look to the language in order to determine what Congress intended, and we also look to the statute's structure, subject matter, context and history for this same purpose. *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) ("We therefore look to the statute before us and ask what Congress intended.... In answering this question, we look to the statute's language, structure, subject matter, context, and history-factors that typically help courts determine a statute's objectives and thereby illuminate its text."). The controversy here centers on the definition of international terrorism, and in particular on the definition of the word "involve," which is susceptible to many meanings. The statutory definition of international terrorism in section 2331(1) is drawn *verbatim* from the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(c) ("FISA"). No court has yet expounded on the meaning or scope of "international terrorism" as it is used in FISA either, so we are not aided by that origin.[FN8] A dictionary definition of "involve" demonstrates the many levels of participation that could constitute involvement. To involve is: to enfold or envelop so as to encumber; to engage as a participant; to oblige to take part; to occupy (as oneself) absorbingly; to commit emotionally; to relate closely; to have within or as part of itself; to require as a necessary accompaniment; to have an effect on. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983). Because of these many possibilities, we agree with the district court that we

must look to the structure, context and legislative history of the statute to determine what Congress intended.

> FN8. A few courts, however, have touched on the application of the term "international terrorism" in the context of FISA. *See United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir.1988) (investigation of "international terrorism" by definition requires investigation of activities that constitute crimes); *United States v. Duggan*, 743 F.2d 59 (2d Cir.1984) (asking a court to apply the definition of "international terrorism" does not embroil the court in a political question and thereby violate the separation of powers doctrine).

The government, in its very helpful *amicus curiae* brief, delineates some of the legislative history of sections 2331 and 2333. That history, in combination with the language of the statute itself, evidences an intent by Congress to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full reaches of traditional tort law. *See*137 Cong. Rec. S4511-04 (April 16, 1991) ("The [antiterrorism act] accords victims of terrorism the remedies of American tort law, including treble damages and attorney's fees."); *Antiterrorism Act of 1990*, Hearing Before the Subcommittee on Courts and Administrative Practice of Committee on the Judiciary, United States Senate, 101st Congress, Second Session, July 25, 1990 (hereafter "Senate Hearing"), Testimony of *Joseph Morris*, at 136 ("[T]he bill as drafted is

powerfully broad, and its intention ... is to ... bring [in] all of the substantive law of the American tort law system."). In particular, the statute itself contains all of the elements of a traditional tort: breach of a duty (i.e., committing an act of international terrorism); injury to the person, property or business of another; and causation (injured "by reason of"). Although the statute defines the class of plaintiffs who may sue, it does not limit the class of defendants, and we must therefore look to tort law and the legislative history to determine who may be held liable for injuries covered by the statute.

The legislative record is replete with references to the then-recent decision in *Klinghoffer v. Palestine Liberation Organization,* 739 F.Supp. 854 (S.D.N.Y.1990), *vacated*, 937 F.2d 44 (2d Cir.1991). *See* Senate Hearing at 1, 12, 17, 79, 83, 122, 133; H.R. Rep. 102-1040, at 5 (1992); 137 Cong. Rec. S4511-04 (April 16, 1991); 136 Cong. Rec. S4568-01 (1990).[FN9]Leon Klinghoffer was a U.S. citizen who was murdered in a terrorist attack on a cruise ship in the Mediterranean Sea. The district court found that his survivors' claims were cognizable in federal court under federal admiralty jurisdiction and the Death on the High Seas Act because the tort occurred in navigable waters. 739 F.Supp. at 858-59. The repeated favorable references to *Klinghoffer* indicate a desire on the part of Congress to extend this liability to land-based terrorism that occurred in a foreign country. See Senate Hearing at 12, Testimony of Alan Kreczko, Deputy Legal Advisor, Department of State ("This bill ... expands the

Klinghoffer opinion."); H.R. Rep. 102-1040, at 5 (1992) ("Only by virtue of the fact that the [Klinghoffer] attack violated certain Admiralty laws and the organization involved-the Palestinian Liberation Organization-had assets and carried on activities in New York, was the court able to establish jurisdiction over the case. A similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S. In order to facilitate civil actions against such terrorists the Committee [on the Judiciary] recommends [this bill]."); 137 Cong. Rec. S4511-04 (April 16, 1991), Statement of Senator Grassley (section 2333 would "codify [the *Klinghoffer*] ruling and makes the right of American victims definitive"); 136 Cong. Rec. S4568-01 (1990).

> FN9. One of Mr. Klinghoffer's surviving daughters testified before both the House and the Senate in favor of the passage of the Antiterrorism Act of 1990. *See* Senate Hearing; H.R. Rep. 102-1040 at 4.

The statute clearly is meant to reach beyond those persons who themselves commit the violent act that directly causes the injury. The Senate report on the bill notes that "[t]he substance of [an action under section 2333] is not de fined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. This bill opens the courthouse door to victims of international terrorism." S. Rep. 102-342, at 45 (1992). This same report also remarks that the legislation, with "its provisions for compensatory

damages, treble damages, and the imposition of liability *at any point along the causal chain of terrorism*," would "interrupt, or at least imperil, the flow of money." *Id.* at 22 (emphasis added). *See also* Statement of Senator Grassley, 136 Cong. Rec. S4568-01 at S4593 ("With the enactment of this legislation, we set an example to the world of how the United States legal system deals with terrorists. If terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them."); Senate Hearing at 17, Statement of Alan Kreczko ("[F]ew terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment. The existence of such a cause of action, however, may deter terrorist groups from maintaining assets in the United States, from benefitting from investments in the U.S. and from soliciting funds within the U.S."); Senate Hearing at 79, Statement of Joseph Morris ("[A]nything that could be done to deter money-raising in the United States, money laundering in the United States, the repose of assets in the United States, and so on, would not only help benefit victims, but would also help deter terrorism."). All of this history indicates an intent by Congress to allow a plaintiff to recover from anyone along the causal chain of terrorism.

But to the extent that the Boims urge a reading of the statute that would lead to liability for merely giving money to Hamas, a group which then sponsored a terrorist act in the manner the Boims have alleged, we agree with the district court, the defendants and the government that those

allegations would be inadequate. To say that funding *simpliciter* constitutes an act of terrorism is to give the statute an almost unlimited reach. Any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor's intent, could be construed to "involve" terrorism. Without also requiring the plaintiffs to show knowledge of and intent to further the payee's violent criminal acts, such a broad definition might also lead to constitutional infirmities by punishing mere association with groups that engage in terrorism, as we shall discuss later in addressing the First Amendment concerns raised here.

Additionally, the statute itself requires that in order to recover, a plaintiff must be injured "by reason of" an act of international terrorism. The Supreme Court has interpreted identical language to require a showing of proximate cause. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (interpreting "by reason of" language in civil RICO provision to require a showing that the defendant's conduct proximately caused the plaintiff's injury). Foreseeability is the cornerstone of proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions. *Suzik v. Sea-Land Corp.*, 89 F.3d 345, 348 (7th Cir.1996); Restatement (2d) of Torts, §§ 440-447. In the circumstances of this case, the Boims cannot show that David Boim was injured "by reason of" the defendants' payments to Hamas in

the traditional tort sense of causation unless they can also show that murder was the reasonably foreseeable result of making the donation. To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation. The government, in its amicus brief, maintains that funding may be enough to establish liability if the plaintiff can show that the provider of funds was generally aware of the donee's terrorist activity, and if the provision of funds substantially assisted the terrorist act in question. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C.Cir.1983) (describing the standards for joint liability for tortious acts). We will consider the government's proposed standard separately in our discussion of aiding and abetting liability. For now we note only that the complaint cannot be sustained on the theory that the defendants themselves committed an act of international terrorism when they donated unspecified amounts of money to Hamas, neither knowing nor suspecting that Hamas would in turn financially support the persons who murdered David Boim. In the very least, the plaintiffs must be able to show that murder was a reasonably foreseeable result of making a donation.[FN10] Thus, the Boims' first theory of liability under section 2333, funding *simpliciter* of a terrorist organization, is insufficient because it sets too vague a standard, and because it does not require a showing of proximate cause.

FN10. The defendants have also argued that Congress listed exhaustively in section

2333(b) all of the offenses which could give rise to liability under section 2333(a). We reject this contention because "international terrorism" is a defined term that includes conduct much broader than the offenses listed in section 2333(b). *See*18 U.S.C. § 2331. Reading the statute as the defendants urge would require us to disregard Congress' express definition of the term "international terrorism."

B.

[3] The Boims' second theory of liability is that the defendants' violation of sections 2339A and 2339B, the criminal counterparts to section 2333, gives rise to civil liability under section 2333. The Boims further contend that sections 2339A and 2339B demonstrate Congress' intent to include the provision of material support to terrorist organizations in the definition of international terrorism for the purposes of section 2333. The district court concluded that Congress viewed violations of sections 2339A and 2339B as "activities involving violent acts or acts dangerous to human life," and therefore found that violations of sections 2339A and 2339B gave rise to civil liability under section 2333. Because much of the conduct the Boims alleged occurred before the passage of sections 2339A and 2339B, however, the district court ruled that the Boims would have to rely primarily on their aiding and abetting theory.

In 1994, Congress passed 18 U.S.C. § 2339A, which

criminalizes the provision of material support to terrorists:

> Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332c, or 2340A of this title or section 46502 of title 49, or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 2339A(a).[FN11] "Material support or resources" is a defined term:

> FN11. The crimes covered by this diverse and extensive list include, in Title 18: § 32, destruction of aircraft or aircraft facilities; § 37, violence at international airports; § 81, arson within special maritime and territorial jurisdiction; § 175, prohibitions with respect to biological weapons; § 351, Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault; § 831, prohibited transactions involving nuclear materials; § 842(m), importing and exporting certain plastic explosives; § 842(n), shipping, transporting, transferring, receiving or

possessing certain plastic explosives; § 844(f), maliciously damaging or destroying personal or real property belonging to the United States; § 844(i), maliciously damaging or destroying personal or real property used in interstate or foreign commerce; § 930(c), killing or attempting to kill a person in a federal facility while illegally possessing a firearm or other dangerous weapon in that facility; § 956, conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; § 1114, protection of officers and employees of the United States; § 1116, murder or manslaughter of foreign officials, official guests or internationally protected persons; § 1203, hostage taking; § 1361, injuries to government property or contracts; § 1362, injury to communication lines, stations or systems; § 1363, damaging buildings or property within the special maritime and territorial jurisdiction; § 1366, destruction of an energy facility; § 1751, Presidential and Presidential staff assassination, kidnapping, and assault; § 1992, wrecking trains; § 2155, destruction of national defense materials, premises or utilities; § 2156, production of defective national defense material, premises or utilities; § 2280, violence against maritime navigation; § 2281, violence against maritime fixed platforms; § 2332, killing of a United States national outside the United States; § 2332a, use of certain weapons of mass destruction; § 2332b, acts of terrorism transcending national boundaries; or § 2340A,

> torture outside the United States. Section 2332c has been repealed. Title 49, § 46502 prohibits aircraft piracy.

In this section, the term "material support or resources" means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

18 U.S.C. § 2339A(b). Two years later, Congress extended criminal liability to those providing material support to foreign terrorist organizations: Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2339B(a)(1). Section 2339B adopts the definition of "material support or resources" provided in section 2339A, and looks to 8 U.S.C. § 1189 for the definition of "terrorist organization." FN12

> FN12. *See* note 2, *supra*.

HLF and QLI, of course, protest the district court's conclusion that funding may form the basis for a section 2333 civil action if the funding meets the standards for criminal liability under sections 2339A

or 2339B. The defendants also fault the district court for relying on Congress' repeal of the jurisdictional immunity of a foreign state that has been designated a state sponsor of terrorism as evidence of Congressional intent to allow a section 2333 civil action against persons who violate sections 2339A and 2339B. *See*28 U.S.C. § 1605(a)(7). HLF and QLI present a number of puzzling arguments against the Boims' theory of civil liability through violations of these criminal statutes. According to HLF and QLI, Congress neither expressly nor impliedly amended the definition of "international terrorism" when it enacted section 2339A and 2339B because (1) these sections set forth criminal offenses separate from the statute making violent acts of international terrorism illegal under U.S. law; [FN13](2) these sections provide for relatively minor criminal penalties compared to the penalties for violent terrorist acts; (3) nothing in the text of either sections 2339A or 2339B suggests that violations of these provisions are acts of international terrorism remediable under section 2333; (4) the inclusion of sections 2339A and 2339B in the terrorism section of Title 18 alone does not mean that Congress intended for violations of these provisions to constitute acts of international terrorism for the purposes of section 2333; and (6) section 2339B contains a separate remedial scheme that does not include a private right of action but instead provides for civil enforcement by the United States. The defendants also argue that even if violations of sections 2339A and 2339B create civil liability under section 2333, the Boims have insufficiently alleged violations of those criminal statutes.

FN13. Presumably, they are referring to 18 U.S.C. §§ 332, 2332a, 2332b and 2332d. These sections proscribe murder, physical violence, the use of weapons of mass destruction, acts of terrorism transcending national boundaries, and engaging in financial transactions with designated terrorist countries. These provisions apply to the person directly engaged in the prohibited activity, as opposed to persons providing material support to those directly engaged in the prohibited activity.

Most of these arguments are tautologous. For example, sections 2339A and 2339B certainly do proscribe different conduct than sections 2332, 2332a, 2332b and 2332d. These latter provisions address the primary perpetrators of violent acts of terrorism, while sections 2339A and 2339B apply to those persons who provide material support to the primary perpetrators of violent acts of terrorism. When it passed sections 2339A and 2339B, Congress undoubtedly intended that the persons providing financial support to terrorists should also be held criminally liable for those violent acts. Indeed, as we have already noted, the Congressional record for section 2333 indicates an intention to cut off the flow of money in support of terrorism generally. S. Rep. 102-342 at 22 (1992). Sections 2339A and 2339B further this goal by imposing criminal liability for financial support of terrorist activities and organizations. The fact that Congress imposed lesser criminal penalties for the financial supporters indicates perhaps that they found the financiers less

dangerous or less culpable than the terrorists they finance, but it does not in any way indicate that Congress meant to limit civil liability to those who personally committed acts of terrorism. On the contrary, it would be counterintuitive to conclude that Congress imposed criminal liability in sections 2339A and 2339B on those who financed terrorism, but did not intend to impose civil liability on those same persons through section 2333.

Section 2339A prohibits the provision of material support for an extensive list of violent crimes associated with terrorism-assassination, kidnapping, arson, destruction of aircraft-that make clear what types of conduct Congress had in mind when it defined "international terrorism" in section 2331(1) as not just the violent acts themselves, but also "activities that *involve* violent acts or acts dangerous to human life." There is no textual, structural or logical justification for construing the civil liability imposed by section 2333 more narrowly than the corresponding criminal provisions. Because Congress intended to impose criminal liability for funding violent terrorism, we find that it also intended through sections 2333 and 2331(1) to impose civil liability for funding at least as broad a class of violent terrorist acts. If the plaintiffs could show that HLF and QLI violated either section 2339A or section 2339B, that conduct would certainly be sufficient to meet the definition of "international terrorism" under sections 2333 and 2331. Such acts would give rise to civil liability under section 2333 so long as knowledge and intent are also shown, as we shall discuss shortly in the context of aiding and

abetting.

We hasten to add that, although proof of a criminal violation under sections 2339A or 2339B might satisfy the definition of international terrorism under section 2333, such proof is not necessary to sustain a section 2333 claim. As we discuss in the context of aiding and abetting, we believe Congress intended for civil liability for financing terrorism to sweep more broadly than the conduct described in sections 2339A and 2339B. We also note that the district court seems to have inadvertently redefined the term "material" in the context of sections 2339A and 2339B as meaning substantial or considerable. The statute itself defines "material support or resources" as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b). Thus, the term relates to the type of aid provided rather than whether it is substantial or considerable. For civil liability, section 2333 requires that the plaintiff be injured "by reason of" the act of international terrorism. Because we believe Congress intended to import standard tort law into section 2333, causation may be demonstrated as it would be in traditional tort law. Congress has made clear, though, through the criminal liability imposed in sections 2339A and 2339B, that even small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability in section 2333.

Congress' goal of cutting off funding for terrorism would be seriously compromised if terrorist organizations could avoid liability by simply pooling together small donations to fund a terrorist act.

We turn finally to 28 U.S.C. § 1605(a)(7). In relevant part, the statute provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, agency[.]

Contrary to the defendants' characterization, the district court did not rely solely on the passage of section 1605(a)(7) in finding that Congress viewed the provision of material support and resources as an act of international terrorism. After finding support in both the text and the structure of sections 2333 and 2331 for this proposition, the court found further reasons in section 1605(a)(7). As the district court noted, "Considering that Congress has permitted foreign states that have been designated state sponsors of terrorism to be sued in United States courts for violating § 2339A, it is hard to argue that Congress did not intend to include such

violations in its definition of 'terrorism' under the statutory scheme." *Boim*, 127 F.Supp.2d at 1016. We take the district court to mean that section 1605(a)(7) implies a foreign state may be sued in the United States for acts that would give rise to criminal liability under section 2339A, not that section 2339A itself has a civil provision. The mechanism for suing a foreign state for these acts that would give rise to criminal liability under section 2339A is section 2333. The defendants complain that Congress did not specifically mention section 2333 as the device by which plaintiffs might sue foreign governments for violations of section 2339A, but they fail to point to any other source of civil liability. We agree that Congress made clear in section 1605(a)(7) its intent to characterize violations of section 2339A as acts of international terrorism under section 2333.

The district court believed there was a timing problem for the Boims in making their case under these criminal provisions because much of the funding conduct allegedly committed by HLF and QLI occurred prior to the passage of sections 2339A and 2339B. Indeed, Hamas was not designated a terrorist organization under section 1189 until 1997, after David's murder. Certainly HLF and QLI could not be held criminally liable for conduct that occurred before the statutes were enacted, but that argument misses the point. We are using sections 2339A and 2339B not as independent sources of liability under section 2333, but to amplify what Congress meant by "international terrorism." Sections 2339A and 2339B merely lend further

support to our finding that Congress considered the provision of material support to terrorists an act of international terrorism. This reading simply amplifies the conclusion we have already reached by examining the language and legislative history of section 2333. Sections 2339A and 2339B provide criminal liability for the provision of material support, and section 2333 provides civil liability. The Boims may thus show that QLI and HLF committed an act of international terrorism subject to civil liability under section 2333 by proving that QLI and HLF provided material support to terrorist organizations. No timing problem arises because sections 2339A and 2339B merely elucidate conduct that was already prohibited by section 2333.

C.

[4] We turn next to the Boims' theory that HLF and QLI may be held civilly liable under section 2333 for aiding and abetting an act of international terrorism. Under this theory, the Boims urge us to find that aiding and abetting a violent act is conduct that "involves" a violent act as that word is used in section 2331(1). HLF and QLI contend that section 2333 does not provide for aiding and abetting liability, and that the Supreme Court in *Central Bank* held that aiding and abetting liability is available only when a statute expressly provides for it. *See Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994); *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). The Boims counter that neither *Central Bank* nor

Sandoval apply to *malum in se* torts such as the murder alleged here. The Boims also contend that section 2333 explicitly extends liability to aiders and abettors because it extends civil liability to "activities that involve violent acts ... that are a violation of the criminal laws of the United States." Because 18 U.S.C. § 2 criminalizes aiding and abetting the commission of a felony, the Boims maintain there is no doubt Congress intended to include liability for aiding and abetting in section 2333. The government, in its *amicus* brief, adds that the language and legislative history of section 2333 indicate an intent by Congress to import into section 2333 civil tort law principles as expressed in the Restatement Second of Torts, and as applied in the cases. Under that jurisprudence, according to the government, aiding and abetting liability should be applied under section 2333, and that result is in no way inconsistent with *Central Bank* and *Sandoval*. Because of *Central Bank*' s pivotal importance to our analysis, we will begin by reviewing the Court's reasoning there.

In *Central Bank*, the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under section 10(b) of the Securities Exchange Act of 1934. 511 U.S. at 177-78, 114 S.Ct. 1439. As the Court has interpreted it, section 10(b) imposes private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities. 511 U.S. at 167, 114 S.Ct. 1439.Yet, that section contains no express cause of action giving private plaintiffs a right to sue. Nonetheless, through judicial interpretation of

the securities laws, an implied right of action was created allowing private parties to sue for damages for violations of section 10(b). Prior to *Central Bank*, some lower courts had interpreted the statute to create a private right of action not only against those who violate section 10(b), but also against those who aid and abet a violation of section 10(b); other courts had found that there was no private right of action for aiding and abetting liability. The Court granted certiorari to resolve the continuing confusion in the circuit courts over the existence and scope of an aiding and abetting action under section 10(b). 511 U.S. at 170, 114 S.Ct. 1439.

The securities laws contain a number of provisions creating an extensive scheme of civil liability. The 1933 and 1934 Acts contain express private rights of action, and the courts have also found private rights of actions to be implied by the terms of sections 10(b) and 14(a) of the 1934 Act. 511 U.S. at 171, 114 S.Ct. 1439. The SEC adopted Rule 10b-5 to further describe the conduct prohibited, and it is under this rule that plaintiffs often brought their actions. The Court noted that determining the elements of rule 10b-5 private action claims had posed difficulty because Congress had not expressly provided for a private 10(b) action and thus had no occasion to offer guidance about the elements of a private liability scheme. 511 U.S. at 172, 114 S.Ct. 1439. The courts thus had to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision of the 1934 Act. 511 U.S. at 173, 114 S.Ct. 1439. Because adherence to the statutory language is the starting point of any

case involving construction of a statute, the Supreme Court refused to allow 10b-5 liability for conduct not prohibited by the text of section 10(b). 511 U.S. at 174, 114 S.Ct. 1439. In view of the fact that section 10(b) made no mention of aiding and abetting liability, the Court found that there could be no private right of action for aiding and abetting a 10(b) violation.

The Court rejected a claim that language in the statute imposing liability on any person who "directly or indirectly" employs a deceptive practice meant that Congress intended to cover aiding and abetting:

> The problem, of course, is that aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.

511 U.S. at 175-76, 114 S.Ct. 1439. Citing section 876(b) of the Restatement (Second) of Torts, the Court acknowledged that aiding and abetting a wrongdoer ought to be actionable in certain other circumstances, but the issue here was whether aiding and abetting was covered by the statute. The Court stated that it was inconsistent with settled methodology in section 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text. The Court found that the statute prohibited only the making of a material misstatement (or omission) or the commission of a

manipulative act. Because the statute did not proscribe giving aid to a person who commits a manipulation or deceptive act, the Court declined to extend liability to aiders and abettors. 511 U.S. at 177-78, 114 S.Ct. 1439.

The Court further noted that it could reach the same result by examining the express causes of action identified in the 1933 and 1934 Acts as models for implied rights of action under those same sections. None of the express causes of actions in the 1934 Act imposed liability on aiders and abettors, and the Court found it would be "anomalous to impute to Congress an intention in effect to expand the defendant class for 10b-5 actions beyond the bounds delineated for comparable express causes of action." 511 U.S. at 180, 114 S.Ct. 1439. This analysis was bolstered by the conclusion that an action against aiders and abettors would allow liability when at least one element critical for recovery under rule 10b-5 is absent: reliance. *Id.* An aiding and abetting action would allow a defendant to be held liable without the usual requisite showing that the plaintiff relied on the defendant's statements or actions, in contravention of the careful limits on 10b-5 recovery mandated by earlier cases. *Id.*

The Court also examined the history of aiding and abetting liability, noting first that Congress enacted 18 U.S.C. § 2, a general aiding and abetting statute applicable to all federal crimes, in 1909. The statute provides that persons who provide knowing aid to those committing federal crimes, with the intent to facilitate the crime, are themselves committing a

crime. 511 U.S. at 181, 114 S.Ct. 1439. The Restatement (Second) of Torts similarly provides for civil liability for aiders and abettors by holding an actor liable for harm resulting to a third person from the tortious conduct of another if the actor knows the other's conduct constitutes a breach of duty and the actor gives substantial assistance or encouragement to the other. Restatement (Second) of Torts, § 876(b). But Congress did not enact a general aiding and abetting statute covering civil actions, either for suits by the government or suits by private parties.

Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.

Central Bank, 511 U.S. at 182, 114 S.Ct. 1439.

Instead, the Court found, Congress had taken a statute-by-statute approach to civil aiding and abetting liability. In sum, the Court found that there was no reason to attach aiding and abetting liability in all federal civil statutes, that Congress had not expressed any intent to extend aiding and abetting liability in this particular statute, and that none of the express causes of action in the 1934 Act extended aiding and abetting liability. Even considering the history of aiding and abetting liability in the criminal and the civil context, the Court found no reason to extend that liability to private causes of action in the securities statutes. Indeed, Congress had expressly provided for another type of secondary

liability in the 1934 Act-"controlling person" liability-and thus the absence of aiding and abetting liability appeared to have been a deliberate choice. 511 U.S. at 183-84, 114 S.Ct. 1439.

The *Central Bank* analysis provides guidance but is not determinative here for a number of reasons. First, *Central Bank* addressed extending aiding and abetting liability to an implied right of action, not an express right of action as we have here in section 2333. Second, Congress expressed an intent in the terms and history of section 2333 to import general tort law principles, and those principles include aiding and abetting liability. T hird, Congress expressed an intent in section 2333 to render civil liability at least as extensive as criminal liability in the context of the terrorism cases, and criminal liability attaches to aiders and abettors of terrorism. *See*18 U.S.C. § 2. Fourth, failing to extend section 2333 liability to aiders and abettors is contrary to Congress' stated purpose of cutting off the flow of money to terrorists at every point along the chain of causation.

Although we have found no support in the cases for the Boims' argument that *Central Bank* does not apply to *malum in se* torts, we also have found no support for the defendants' claim that *Central Bank* eliminates all aiding and abetting liability in federal civil cases except when the words "aid and abet" appear in a statute.[FN14] The Court carefully crafted *Central Bank*'s holding to clarify that aiding and abetting liability would be appropriate in certain cases, albeit not under 10(b). *Central Bank*, 511 U.S.

at 177, 114 S.Ct. 1439. The first significant factor distinguishing section 2333 from section 10(b) is that section 2333 provides for an express civil right of action by private parties whereas the courts have created an implied right of action under section 10(b). Thus, the courts were already inferring an intent by Congress to create a private civil cause of action with section 10(b), and they would have been stacking another inference on top of that one in extending liability to aiders and abettors in rule 10b-5 actions. The Court was understandably reluctant to pile inference upon inference in determining Congressional intent. But no such stacking is required in section 2333, which expressly creates a private right of action for plaintiffs who are injured by reason of an act of international terrorism. *Sandoval* is distinguishable for the very same reason; it addressed an implied right of action founded on a regulation promulgated under Title VI. Here we have an express private right of action, where Congress' intent is clear from the language and structure of the statute itself as well as from the legislative history. As we will discuss below, although the words "aid and abet" do not appear in the statute, Congress purposely drafted the statute to extend liability to all points along the causal chain of terrorism. It is not much of a leap to conclude that Congress intended to extend section 2333 liability beyond those persons directly perpetrating acts of violence. Indeed, the statute itself defines international terrorism so broadly-to include activities that "involve" violent acts-that we must construe it carefully to meet the constitutional standards regarding vagueness and First

Amendment rights of association.

> FN14. The Fourth Circuit, in *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 252-53 (4th Cir.1997), considered the First Amendment implications of a civil suit seeking to hold liable the publishers of a book for a murder committed by a reader. The book, entitled "*Hit Man: A Technical Manual for Independent Contractors*," detailed how to commit murder-for-hire, and the publisher stipulated that it both knew and intended that its readers would use the book to commit murder. Under those circumstances, the court held that liability for aiding and abetting a *malum in se* crime such as murder via speech intended to assist and encourage others in that crime would not run afoul of the First Amendment. Although the *Rice* court did not expressly reference *Central Bank*, its holding is consistent with the Boims' reading of that case.

The next distinguishing factor is that the language and legislative history of section 2333 evidence an intent to import general tort law principles into the statute, a factor glaringly absent from section 10(b). *See*137 Cong. Rec. S4511-04 (April 16, 1991); Senate Hearing at 136. Nothing in section 10(b) reflects an intent to incorporate general tort law principles, and a careful review of that statute demonstrates to the contrary that Congress intended to limit liability in certain instances. As the Supreme Court noted,

Congress imposed some forms of secondary liability in section 10(b) (such as controlling person liability), but not others, manifesting a deliberate choice to exclude aiding and abetting liability. In contrast, the language of section 2333 tracks the traditional elements of tort law as expressed in the Restatement, and the legislative history expressly references tort principles in setting out the perimeters of Congress' intent.

Unlike section 10(b), Congress also expressed an intent in section 2333 to make civil liability at least as extensive as criminal liability. The statute defining "international terrorism" includes activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1). This language, embracing activities that "involve" violent acts, taken at face value would certainly cover aiding and abetting violent acts. Remember, too, the criminal laws include 18 U.S.C. § 2, which creates liability for aiding and abetting violations of any other criminal provisions. By incorporating violations of any criminal laws that involve violent acts or acts dangerous to human life, Congress was expressly including aiding and abetting to the extent that aiding and abetting "involves" violence. As we discussed earlier, "involve" is a rather broad word. If we were to interpret "involve" literally, we would be attributing almost unlimited liability to any act that had some link to a terrorist act. Congress could not have meant to

attach unlimited liability to even remote acts; it must have meant something else. As we have seen from the language and legislative history of section 2333, that something else is traditional tort and criminal liability. Aiding and abetting, which is surely subsumed in the definition of acts that "involve" certain criminal violations, is a well known and well defined doctrine. *See Damato v. Hermanson*, 153 F.3d 464, 472 n. 10 (7th Cir.1998) (in the criminal context, the aider and abettor knowingly assists the principal in the attainment of the illegal objective and therefore is sanctioned as the principal); *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir.1991), *aff'd*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) (the crime of aiding and abetting requires knowledge of the illegal activity that is being aided and abetted, a desire to help that activity succeed, and some act of helping). *See also Halberstam v. Welch*, 705 F.2d 472, 477and 481-84 (D.C.Cir.1983) (setting forth the elements for civil liability for aiding and abetting). That Congress did not use the words "aid and abet" in the statute is not determinative when it did use words broad enough to include all kinds of secondary liability. *See Harris Trust*, 530 U.S. at 246, 120 S.Ct. 2180 (holding that ERISA reaches farther than the immediate wrongdoer because the statute focuses not on the class of possible defendants but rather on redressing a particular act or practice which violates the statute). Indeed, limiting the term "involve" to the familiar definitions of aiding and abetting (or even conspiracy, for that matter) provides the necessary clarification that saves the statute from vagueness. *Central Bank* is thus distinguishable on this ground

as well.

Finally, if we failed to impose liability on aiders and abettors who knowingly and intentionally funded acts of terrorism, we would be thwarting Congress' clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence. S. Rep. 102-342, at 22 (by imposing "liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of money."). Unlike section 10(b) where Congress' intent could be met without imposing liability on aiders and abettors, Congress' purpose here could not be met unless liability attached beyond the persons directly involved in acts of violence. The statute would have little effect if liability were limited to the persons who pull the trigger or plant the bomb because such persons are unlikely to have assets, much less assets in the United States, and would not be deterred by the statute. *See Central Bank*, 511 U.S. at 188, 114 S.Ct. 1439 (policy considerations may be used to interpret the text and structure of a statute when a literal reading would lead to a result so bizarre that Congress could not have intended it). Also, and perhaps more importantly, there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence. Moreover, the organizations, businesses and nations that support and encourage terrorist acts are likely to have reachable assets that they wish to protect. The only way to imperil the flow of money and discourage the financing of terrorist acts

is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts. For all of these distinguishing reasons, we do not think *Central Bank* controls the result here, but that aiding and abetting liability is both appropriate and called for by the language, structure and legislative history of section 2333.

D.

The defendants raise two First Amendment objections to this section 2333 action against them. First, they argue that the Boims seek to hold them liable for their mere association with Hamas. Harking back to a line of cases involving the Communist party, HLF and QLI contend that, when an organization has both legal and illegal aims, a person may not be punished for mere membership in or association with that organization, but may be held civilly liable only if he or she possesses the specific intent to further the organizations' illegal purposes. Second, they contend that, to the extent the Boims' claim is founded on a violation of section 2339B, it cannot withstand First Amendment scrutiny because section 2339B fails to account for the intent and the associational rights of the contributors who donate money for humanitarian purposes. The National Coalition to Protect Political Freedom and the Center for Constitutional Rights have jointly filed an *amicus* brief in support of the defendants' First Amendment arguments, and we will consider their contentions as well.

1.

[5] HLF and QLI begin their argument with the well-established proposition that the Constitution protects against the imposition of liability based solely upon association with a group. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."); *Healy v. James*, 408 U.S. 169, 185-86, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) ("the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."); *United States v. Robel*, 389 U.S. 258, 265, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) (where a statute establishes guilt by association alone, the inhibiting effect on First Amendment rights is clear); *Scales v. United States*, 367 U.S. 203, 229, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961) (a blanket prohibition of association with a group having both legal and illegal aims presents a real danger that legitimate political expression or association would be impaired). We have no quarrel with that general proposition or with its corollary, that in order to impose liability on an individual for association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims. *Claiborne Hardware*, 458 U.S. at 920-21, 102 S.Ct. 3409; *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 703 (7th Cir.2001), *cert.*

granted, 535 U.S. 1016, 122 S.Ct. 1604, 152 L.Ed.2d 619 and 535 U.S. 1016, 122 S.Ct. 1605, 152 L.Ed.2d 619 (2002).

[6] HLF and QLI protest that the Boims have not alleged their specific intent to further the illegal activities of Hamas, and that the claim does not, therefore, survive First Amendment scrutiny. Rather, HLF complains, the Boims have simply alleged that HLF has admitted providing funds to Hamas, that HLF functions as a front organization for Hamas, that HLF raises and channels funds to Hamas to finance terrorist activities in Israel, and that HLF solicits donations over the internet. HLF protests that even if these allegations suffice to show a present intent to further terrorist acts, they do not show that HLF had that intent prior to David Boim's murder. Rather, HLF believes the Boims are lumping their organization in with other groups that may have had an intent to commit illegal acts, and that the Boims are seeking to hold them liable for their mere association with these other organizations. QLI similarly argues that the Boims have not alleged a specific intent on the part of QLI to further the illegal goals of Hamas, and that they may not be held liable for merely associating with organizations that might have intended to aid the illegal operations of Hamas.

Amici also emphasize that individuals may not be penalized for their association with a political organization that engages in both lawful and unlawful ends, absent a showing of specific intent to further the organization's illegal goals. *Claiborne*

Hardware, 458 U.S. at 919-20, 102 S.Ct. 3409. The arguments of the defendants and *amici* beg the question, though, because section 2333 does not seek to impose liability for association alone but rather for involvement in acts of international terrorism. The defendants nonetheless object that the definition of acts of international terrorism is so broad that they might be held liable for involvement in terrorist activity when all they intended was to supply money to fund the legitimate, humanitarian mission of Hamas or other organizations. To resolve the tension that arises when a group engages in both protected advocacy and unprotected criminal acts, we look to *Claiborne Hardware* and to earlier cases that arose out of the McCarthy era, when the government sought to impose liability on persons for their association with the Communist Party.

In *Claiborne Hardware*, a group of white merchants and business owners sued the National Association for the Advancement of Colored People ("NAACP") for engaging in a boycott of white-owned businesses. The merchants alleged that, in enforcing the boycott, some of the members of the defendant NAACP had engaged in acts of physical force and violence, and that the NAACP should therefore be held liable for the merchants' losses. The Court first held that speeches and nonviolent picketing in support of the boycott were activities normally entitled to protection under the First Amendment. 458 U.S. at 907, 102 S.Ct. 3409. The Court noted that the right of association, the right to join many voices together to strengthen a message and make certain it is

heard, is an important constitutional guarantee. 458 U.S. at 908, 102 S.Ct. 3409. That right "to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advanced doctrine that is itself not protected." 458 U.S. at 908, 102 S.Ct. 3409. At the same time, "[t]he First Amendment does not protect violence." 458 U.S. at 916, 102 S.Ct. 3409.

Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of "advocacy."

Claiborne Hardware, 458 U.S. at 916, 102 S.Ct. 3409 (quoting *Samuels v. Mackell*, 401 U.S. 66, 75, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (Douglas, J., concurring)). The Court concluded that no federal rule of law restricts a state from imposing tort liability for business losses caused by violence or the threat of violence, but that when such conduct occurs in the context of constitutionally protected activity, precision of regulation is required. *Claiborne Hardware*, 458 U.S. at 916, 102 S.Ct. 3409. When activity protected by the First Amendment is present, damages are restricted to the direct consequences of the illegal violent conduct and may not include the consequences resulting from associated peaceful picketing or other protected First Amendment activity. 458 U.S. at 918, 102 S.Ct. 3409 (citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 729, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)). Citing *Scales*,*Healy* and *Noto*, the Court summarized the rule to be applied:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.
>
> *Claiborne Hardware*, 458 U.S. at 920, 102 S.Ct. 3409.

We have already held that the Boims may prevail on their claim by showing, among other things, that the defendants aided and abetted David's murder. This requires them to prove that the defendants knew of Hamas' illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities. *See Zafiro*, 945 F.2d at 887. If the Boims are able to prove the defendants aided and abetted terrorist acts, liability would not offend the principles announced in *Claiborne Hardware*. The Boims have alleged that HLF and QLI supplied money to Hamas to fund terrorist operations, that they are "front" organizations with ostensibly legitimate purposes which are actually engaged in fund-raising and money laundering in support of terrorist activities. They have alleged that HLF and QLI provided the money to purchase the weapons and train the men who killed David Boim. HLF and QLI, of course, deny these allegations and argue that as a factual matter, Hamas is primarily a humanitarian organization, and that any money supplied to Hamas

by QLI and HLF was intended to fund humanitarian efforts, not terrorism. This is a classic factual dispute, not suitable for resolution on a motion to dismiss for failure to state a claim. If the Boims are able to prove their allegations, that HLF and QLI provided legitimate-looking fronts for raising money to support the terrorist operation that resulted in David Boim's murder, their claim will not run afoul of the First Amendment. The Boims are not seeking to hold HLF and QLI liable for their mere association with Hamas, nor are they seeking to hold the defendants liable for contributing money for humanitarian efforts. Rather, they are seeking to hold them liable for aiding and abetting murder by supplying the money to buy the weapons, train the shooters, and compensate the families of the murderers. That Hamas may also engage in legitimate advocacy or humanitarian efforts is irrelevant for First Amendment purposes if HLF and QLI knew about Hamas' illegal operations, and intended to help Hamas accomplish those illegal goals when they contributed money to the organization. *Claiborne Hardware,* 458 U.S. at 932, 102 S.Ct. 3409; *Scales,* 367 U.S. at 229, 81 S.Ct. 1469; *Noto,* 367 U.S. at 298, 81 S.Ct. 1517; *Healy,* 408 U.S. at 186, 92 S.Ct. 2338; *Scheidler,* 267 F.3d at 703.

Moreover, we believe the Boims' allegations lend adequate support to their claims against QLI and HLF. Rule 8(a) requires only a short and plain statement of the claim showing that the Boims are entitled to relief. The defendants repeatedly confuse what must be alleged with what must be proved. The

plaintiffs need not set out in detail all of the facts upon which they base their claim. They need only give QLI and HLF fair notice of what their claim is and the grounds upon which it rests. *Leatherman*, 507 U.S. at 168, 113 S.Ct. 1160. This they have done.

They allege that QLI and HLF violated section 2333 by aiding and abetting Hinawi and Al-Sharif in committing the murder of David Boim. An aiding and abetting claim will require the Boims to prove that QLI and HLF knew about Hamas' illegal operations and provided aid to Hamas with the intent to facilitate those illegal activities. In support of the claim that HLF and QLI aided and abetted the terrorists who murdered David, the Boims allege that HLF and QLI were engaged in raising and laundering money for Hamas; that HLF and QLI functioned as fronts for Hamas in the United States; that HLF raised and channeled funds to Hamas to finance terrorist activities in Israel; that David's attackers were Hamas terrorists; that Hamas' central purpose is to advance its political goals through terrorism; that HLF and QLI's purportedly humanitarian functions masked their core mission of raising and funneling money and other resources to Hamas in support of its terrorist campaigns; that HLF and QLI comingled money destined for terrorist causes with funds from their legitimate charitable and business dealings in order to avoid laws against providing financial support to terrorists; that money gathered in this way was sent by the front organizations (including HLF and QLI) from the United States to Hamas to buy weapons and carry out terrorist attacks, including the murder of David

Boim; and that money provided by the front organizations to finance terrorist activities was in fact used for that purpose and in particular was used to purchase the vehicle, machine guns, and ammunition used to kill David, as well as to train his killers and to provide a stipend for the family of one of his murderers. That is more than sufficient to notify the defendants of the nature of the claims against them. These allegations also implicitly assert that the defendants had the intent to further the illegal aims of Hamas prior to David's murder, contrary to the defendants' characterization. The Boims' theory of the case, that QLI and HLF aided and abetted Hamas in murdering David Boims, does not offend the First Amendment because they seek to hold QLI and HLF liable not for their associations or speech but for their knowing and intentional financial support of illegal activities. We also note that discovery will certainly clarify the Boims' theory of the case, and we will not dismiss a complaint before discovery unless it appears beyond doubt that the Boims can prove no set of facts in support of their claim which would entitle them to relief. *Slaney,* 244 F.3d at 597. Although the defendants claim to have been supporting only the humanitarian mission of Hamas, that is a fact question that cannot be resolved at this early stage of the litigation.

2.

[7] We turn next to the defendants' contention that any section 2333 claim founded on a violation of section 2339B must fail because section 2339B

violates the First Amendment. As we noted above, section 2339B subjects to criminal liability anyone who, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so. 18 U.S.C. § 2339B(a)(1). The defendants complain that, because section 2339B imposes liability without regard to the intent of the donor, it violates the First Amendment. They maintain that section 2339B unnecessarily interferes with the associational rights of contributors who donate money solely for humanitarian purposes by failing to limit liability to those who intend to support the illegal goals of an organization. They contend that section 2339B will chill legitimate fund-raising for humanitarian purposes if a charitable organization could be prosecuted for providing food for the needy in the Middle East that happens to make its way into the mouths of the families of terrorists. They urge us to reject the reasoning of the Ninth Circuit in *Humanitarian Law Project v. Reno,* 205 F.3d 1130 (9th Cir.2000), *cert. denied*, 532 U.S. 904, 121 S.Ct. 1226, 149 L.Ed.2d 136 (2001), in upholding the constitutionality of section 2339B against a First Amendment challenge. They argue that *Humanitarian Law Project* is inconsistent with *Claiborne Hardware*, and that even if it is not, it is factually distinguishable from the instant case.

These arguments miss the mark because the constitutionality of section 2339B is not before us. The defendants have not been charged with a criminal violation of section 2339B. As we discussed

above, section 2339B is relevant to the Boims' claim only to the extent that it helps define what conduct Congress intended to include in its definition of "international terrorism." Section 2339B provides further support to the Boims' theory that Congress meant to include funding terrorism as an act "involving" violence. It is the constitutionality of section 2333 that concerns us today, and as we have just found, funding that meets the standard for aiding and abetting terrorist acts does not offend the First Amendment. We take the defendants' argument to be that a section 2333 claim founded solely on conduct that would render a person criminally liable under section 2339B would violate the First Amendment. With this refinement to the question, we turn to the Ninth Circuit's analysis of section 2339B.

The plaintiffs in *Humanitarian Law Project* were organizations and individuals who wished to provide money to two groups that had been designated as foreign terrorist organizations under 8 U.S.C. § 1189. They sought a preliminary injunction barring enforcement of section 2339B against them, and maintained that they intended only to support the nonviolent humanitarian and political activities of the designated groups. They argued, as HLF and QLI do here, that 2339B violates the First Amendment because it imposes liability on persons who provide material support to terrorist organizations regardless of whether the donor intends to further the unlawful goals of the organization. The plaintiffs relied on *Claiborne Hardware* for the proposition that "[f]or liability to

be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Humanitarian Law Project,* 205 F.3d at 1133 (quoting *Claiborne Hardware,* 458 U.S. at 920, 102 S.Ct. 3409).

Claiborne Hardware and the similar cases we have discussed *supra* apply to situations where the government seeks to impose liability on the basis of association alone, *i.e.*, on the basis of membership alone or because a person espouses the views of an organization that engages in illegal activities. Conduct giving rise to liability under section 2339B, of course, does not implicate associational or speech rights. *Humanitarian Law Project,* 205 F.3d at 1133. Under section 2339B, and indeed under section 2333, HLF and QLI may, with impunity, become members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas. Section 2339B prohibits only the provision of material support (as that term is defined) to a terrorist organization. There is no constitutional right to provide weapons and explosives to terrorists, nor is there any right to provide the resources with which the terrorists can purchase weapons and explosives. 205 F.3d at 1133.

Advocacy is always subject to the highest levels of scrutiny under the First Amendment, but donations are not always equivalent to advocacy and are subject to greater government regulation. In *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court upheld the $1000 limit on

political contributions to candidates for federal offices by individual donors. The Court acknowledged the expressive element of a contribution to a political campaign, noting that a contribution serves as a general expression of support for a candidate and the candidate's views, but does not communicate the underlying basis for the support. 424 U.S. at 21, 96 S.Ct. 612. Because the expression involved in donating money "rests solely on the undifferentiated, symbolic act of contributing," the size of the donation provides only a very rough estimate of the intensity of the contributor's support for the candidate. 424 U.S. at 21, 96 S.Ct. 612. The Court concluded that a limitation on the amount of money a person may contribute thus involved little direct restraint on the donor's political communication. Any size contribution will permit a symbolic expression of support, but a limitation on the size does not infringe the contributor's freedom to discuss issues. The Court acknowledged that the funds might be used by the candidate to present views to voters, but "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 21, 96 S.Ct. 612. The Court found that associational interests were also implicated because making a contribution affiliates a person with a candidate, and enables like-minded people to pool their resources to further political goals. 424 U.S. at 22, 96 S.Ct. 612. Setting the standard for reviewing governmental regulation in this context, the Court held that "[e]ven a significant interference with protected rights of political association may be sustained if the State

demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. at 25, 96 S.Ct. 612 (internal quote marks omitted).

Applying the *Buckley* standard to section 2333 claims founded on conduct that would give rise to criminal liability under section 2339B, we conclude that the government's interest in preventing terrorism is not only important but paramount. *Humanitarian Law Project*, 205 F.3d at 1135. Although that interest has been made all the more imperative by the events of September 11, 2001, the terrorist threat to national security was substantial in 1992 when Congress passed section 2333 and in 1996 when Congress passed section 2339B. That interest is unrelated to suppressing free expression. A section 2333 suit founded on conduct violating section 2339B does not punish membership in a designated terrorist organization, or penalize the expression of views held by these organizations. Rather, such a suit is aimed at prohibiting the funding of violent acts that these organizations wish to carry out. 205 F.3d at 1135.

The only remaining question is whether a section 2333 action based on conduct that violates section 2339B employs means closely drawn to avoid unnecessary abridgement of associational freedoms. Section 2339B forbids the provision of any amount of "material support or resources" to a foreign terrorist organization. "Material support or resources" includes, among other things, money, training, weapons, lethal substances, explosives and

personnel. Congress determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Pub.L. 104-132, Section 301. Terrorist organizations use funds for illegal activities regardless of the intent of the donor, and Congress thus was compelled to attach liability to all donations to foreign terrorist organizations. In order to be designated a terrorist organization, a group must engage in terrorist activity that threatens the security of United States nationals or the national security of the United States. 8 U.S.C. § 1189(a). "Terrorist activity" is defined, in relevant part, as unlawful activity which involves any of the following: the hijacking or sabotage of any aircraft, vessel or vehicle; the seizing, detaining or threatening to kill, injure or continue detaining an individual in order to compel a third person to do or abstain from doing any act as a condition for the release of the individual detained; a violent act upon an internationally protected person; an assassination; the use of any biological agent, chemical agent, nuclear weapon or device, or explosive or firearm, with intent to endanger the safety of one or more individuals or cause substantial damage to property. 8 U.S.C. § 1182(a)(3)(B)(ii). Given the stringent requirements that must be met before a group is designated a foreign terrorist organization, Congress carefully limited its prohibition on funding as narrowly as possible in order to achieve the government's interest in preventing terrorism. We note that Congress did not attach liability for simply joining a

terrorist organization or zealously espousing its views. By prohibiting funding alone, Congress employed means closely drawn to avoid unnecessary abridgement of associational freedoms. A section 2333 action founded on conduct violating section 2339B is sufficiently tailored to achieve an important government interest and does not run afoul of the First Amendment. *Humanitarian Law Project*, 205 F.3d at 1136.

III.

In short, we answer the three questions certified by the district court as follows: funding, *simpliciter*, of a foreign terrorist organization is not sufficient to constitute an act of terrorism under 18 U.S.C. § 2331. However, funding that meets the definition of aiding and abetting an act of terrorism does create liability under sections 2331 and 2333. Conduct that would give rise to criminal liability under section 2339B is conduct that "involves" violent acts or acts dangerous to human life, and therefore may meet the definition of international terrorism as that term is used in section 2333. Finally, as we have set forth the elements of an action under section 2333, civil liability for funding a foreign terrorist organization does not offend the First Amendment so long as the plaintiffs are able to prove that the defendants knew about the organization's illegal activity, desired to help that activity succeed and engaged in some act of helping. The plaintiffs have not yet had an opportunity to develop the facts of their case. Today we hold that dismissal would be premature at this stage of the litigation because we can envision a set

of facts in support of the claim they have alleged that would entitle them to relief.

AFFIRMED.

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Supreme Court, U.S.
FILED

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William K. Suter, Clerk

No. 08-___

IN THE

Supreme Court of the United States

STANLEY BOIM, individually and as administrator of the ESTATE OF DAVID BOIM, deceased, and JOYCE BOIM,
Petitioners,

v.

MUHAMMAD ABDUL HAMID KHALIL SALAH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

United States District Court,
N.D. Illinois, Eastern Division.

Stanley BOIM, Individually and as Administrator of the Estate of David Boim, deceased, and Joyce Boim, *Plaintiffs*,
v.
QURANIC LITERACY INSTITUTE, Holy Land Foundation for Relief and Development, Islamic Association for Palestine, American Muslim Society, American Middle Eastern League for Palestine, United Association for Studies and Research, Mohammed Abdul Hamid Khalil Salah, Mousa Mohammed Abu Marzook, Amjad Hinawi, and the Estate of Khalil Tawfiq Al-Sharif, *Defendants*.

No. 00 C 2905

Feb. 18, 2005.

MEMORANDUM OPINION AND ORDER

KEYS, Magistrate J.

On May 13, 1996, David Boim, a seventeen-year-old American citizen living in Israel, was killed in a Hamas terrorist attack in the West Bank. David's parents, Joyce and Stanley Boim, sued under the Antiterrorism Act of 1990, 18 U.S.C. § 2300 *et seq.* (West 2004), which creates a cause of action for United States nationals who are injured in their person, property, or business by reason of an act of

international terrorism; the Act allows injured persons (or their estates, survivors or heirs) to recover threefold the damages sustained, as well as costs of suit, including attorney's fees. *See* 18 U.S.C. § 2333.

The Act does not specify who may or should be sued. But the Boims named as defendants two men who were directly involved in the murder, Amjad Hinawi and Khalil Tawfiq Al-Sharif. They also named several U.S.-based individuals and organizations they claim helped to support Hamas-namely, Mousa Abu Marzook, who the Boims alleged served for many years as the admitted leader of Hamas' political wing in the United States, Mohammed Salah, who they alleged served as the United States-based leader of Hamas' military branch, the United Association for Studies and Research, which they alleged serves as Hamas' political command center in the United States, and the Quranic Literacy Institute, the Holy Land Foundation for Relief and Development, the Islamic Association for Palestine, the American Muslim Society, and the American Middle Eastern League for Palestine, which they alleged raise and launder money for Hamas and finance Hamas' terrorist activities.

The Court entered default judgments against Amjad Hinawi, UASR, and AMELP, and dismissed the case as to Mousa Abu Marzook and the estate of Khalil Tawfiq Al-Sharif. On November 10, 2004, the Court entered summary judgment against HLF, IAP/AMS and Mohammad Salah on the issue of

liability. On December 1, 2004, the case went to trial on the two issues left unresolved by the proceedings up to that point: the question of whether the Quranic Literacy Institute was liable to the Boims under the statute, and the question of the amount of damages, if any, to be awarded to the Boims from the liable defendants.

In light of the Court's rulings on summary judgment, and because the United States Treasury Department's Office of Foreign Assets Control had seized and frozen the assets of HLF, counsel for that entity elected not to participate in-or even attend-the liability phase of the trial; counsel for IAP/AMS and Mr. Salah followed suit. Counsel for all three defendants informed the Court that they might attend and possibly participate in the damages portion of the trial, and the Court advised them that that was acceptable, yet none of them showed up.

Prior to the trial, John Beal, counsel for QLI, whose liability was still very much an open question, requested a continuance of the trial date. Mr. Beal advised the Court that, because his client was a relatively minor player, he had been planning to ride the coattails of the other defendants' defenses; with the other defendants going out on summary judgment and electing not to participate in the trial, he argued, he could not reasonably be expected to carry the ball on his own without being given several more months to prepare. The Court denied Mr. Beal's motion for a continuance; given that the trial date had been set for at least six months, and given that the Boims had moved for summary judgment

against all of the defendants except QLI, Mr. Beal had ample notice that he might be the sole defendant to survive to trial. Following that ruling, Mr. Beal moved to withdraw from the case; the Court denied that motion as well, as it was quite clearly a backdoor attempt to push back the trial date and would have resulted in substantial prejudice to the Boims.

On the morning the trial was set to begin, Mr. Beal filed a "Notice of Non-Participation," advising the Court that he would attend the trial, but would not "actively participate in jury selection, will not give an opening statement, will not cross examine plaintiffs' witnesses, will not present defense witnesses or introduce defense exhibits, and will not give a closing argument." The Court advised Mr. Beal, and also advised his client, QLI's principal, Amer Haleem, that it believed counsel's planned course of action was both risky and foolish; the Court cautioned counsel and Mr. Haleem that it was counsel's job-not the Court's-to defend QLI, and that, however counsel chose to proceed, the Court would not assume that responsibility. Both Mr. Beal and Mr. Haleem indicated that they understood what was at stake, but were nonetheless determined not to participate in the trial.

At trial, Mr. Beal remained true to his word; he declined to participate in jury selection, and throughout the trial, he remained largely mum. After the Boims' attorney finished his opening statement, the Court asked Mr. Beal if he wished to make an opening statement, and he declined. Each

time counsel for the Boims finished examining a witness, the Court asked Mr. Beal whether he had any questions of the witness, and, each time, he said no. When counsel for the Boims asked the Court to admit the plaintiffs' trial exhibits, the Court asked Mr. Beal whether he wanted to make any objections, and he said no. After the Boims' attorney finished his closing argument, the Court asked Mr. Beal if he wanted to address the jury, and he declined. Mr. Beal attended the jury instruction conference, but did not participate. During deliberations, the jury requested to see the demonstrative exhibits. When the Court asked Mr. Beal whether he had any position with respect to whether the demonstrative exhibits should be permitted to go back to the jury room, he did not object.

At the close of the evidence, the Boims moved for judgment as a matter of law, and Mr. Beal made his own motion, on behalf of QLI, for judgment as a matter of law. The Court denied both motions, and sent the case to the jury. On December 8, 2004, the jury returned its verdict: it found QLI liable and awarded damages in the amount of $52 million against all Defendants; the Court then tripled the jury's award, as required by § 2333, for a total award of $156 million.

On December 17, 2004, QLI filed a motion seeking judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), or, in the alternative, for a new trial pursuant to Federal Rule of Civil Procedure 59. In its motion, QLI argues that judgment as a matter of law is appropriate because

the Boims failed to prove all of the essential elements of their claim, and because the jury's verdict was not supported by the evidence. Alternatively, QLI argues that it is entitled to a new trial for the same reasons, because it was adversely affected by the way in which the trial was handled, and because the jury's award is excessive. Defendants HLF, IAP/AMS and Mr. Salah also filed post-trial motions, adopting QLI's arguments about the excessiveness of the award.

Federal Rule of Civil Procedure 50 provides that "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party...."Fed.R.Civ.P. 50(a)(1). A party seeking relief under Rule 50(b) faces a high hurdle; to afford relief after a verdict has been returned, the Court must basically find that the jury was irrational when it reached the verdict it did; the motion should be granted only when, considering the totality of the evidence, the Court finds that no rational jury could have reached the verdict that the jury reached. *See Harvey v. Office of Banks & Real Estate,* 377 F.3d 698, 707 (7th Cir.2004); *Ciesielski v. Hooters Management Corp.*, No. 03 C 1175, 2004 WL 2997648, at *1 (N.D.Ill.Dec.27, 2004). In ruling on a motion under Rule 50(b), the Court views the evidence and all reasonable inferences in a light most favorable to the party who prevailed under the verdict; the Court does not re-weigh the evidence

presented at trial or make credibility determinations. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).*See also Cygnar v. City of Chicago,* 865 F.2d 827, 834 (7th Cir.1989) (judgment as a matter of law is proper only when the evidence and all reasonable inferences drawn from it are insufficient to support the verdict when viewed in the light most favorable to the prevailing party)."If the evidence, taken as a whole, provides a sufficient probative basis upon which a jury could reasonably reach a verdict ..., the motion must be denied." *Cygnar,* 865 F.2d at 834 (citing *Anderson v. Gutschenritter,* 836 F.2d 346, 348 (7th Cir.1988)).

When made after the jury has returned its verdict, a Rule 50 motion may be joined with a motion for a new trial under Rule 59. Fed.R.Civ.P. 50(b)."Rule 59(a) allows the Court to grant a new trial if the 'verdict is against the weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party." ' *Egebergh v. Village of Mount Prospect,* No. 96 C 5863, 2004 WL 856437, at *1 (N.D.Ill. April 20, 2004) (quoting *Briggs v. Marshall,* 93 F.3d 355, 360 (7th Cir.1996)).

To prevail on their claim against QLI, the Boims had to show that QLI provided material support to Hamas, or that it attempted or conspired to provide material support to Hamas. 18 U.S.C. § 2333. The Boims' theory, as alleged in their complaint, was that QLI provided an aura of legitimacy to Mohammed Salah by purporting to employ him as a computer analyst, effectively permitting him to

continue to act on behalf of Hamas without raising suspicion; the Boims alleged that QLI helped to conceal Mr. Salah's role as Hamas' military commander, and served as the vehicle through which he channeled hundreds of thousands of dollars to Hamas operatives. *See* First Amended Complaint, ¶¶ 5, 44.

In support of its motion for judgment as a matter of law, QLI first argues that the evidence presented at trial was insufficient to allow the jury to conclude that QLI knowingly provided Mohammed Salah with "cover" or funneled any funds to Hamas through Mr. Salah, a necessary predicate to its decision to hold QLI liable for David's death; at best, QLI argues, the evidence was "suspicious" or "consistent with" the notion that QLI supported Hamas. Thus, QLI argues, the jury's findings in this regard must have been based upon speculation and conjecture, which is impermissible.

The Court disagrees with QLI's characterization of the evidence adduced at trial. Amer Haleem, QLI's Secretary, testified that Mohammed Salah, who had already been found by the Court to have provided material support to Hamas, worked for QLI as a volunteer, doing some computer and administrative work. He further testified that, despite Mr. Salah's supposed volunteer status, QLI helped to arrange significant stipends-$3,000 per month per person-for Mr. Salah, as well as two of QLI's principals, from Yassin Kadi, who Mr. Haleem tried to portray as a Saudi Arabian philanthropist, while the Boims tried to portray him as a financier of terrorism. Mr.

Haleem also testified that, despite Mr. Salah's volunteer status, Mr. Haleem executed a letter that claimed Mr. Salah was a paid employee of QLI, and that he had been one for some time. He further testified that he wrote this letter with the goal of trying to help Mr. Salah obtain an apartment.

This testimony-taken together with the testimony of Matthew Levitt, the Boims' terrorism expert, who explained to the jury how terrorist networks such as Hamas operate, and with the evidence of Mr. Salah's extensive role in Hamas-would be more than enough to provide a sufficient basis for the jury's verdict. It is true that Mr. Haleem offered the jury explanations for why he wrote the letter to help Mr. Salah obtain housing, and for why QLI arranged for Mr. Salah to receive $3,000 a month from someone who was designated by the United States as a terrorist. But the jury was free to accept or reject those explanations; it obviously chose to reject them, and the Court may not second guess that decision. *See Reeves,* 530 U.S. at 150-51 (in ruling on a motion for judgment as a matter of law, the court may not make credibility determinations or weigh the evidence; those are jury functions).

Next, QLI argues that the Boims failed to prove that Hamas killed David Boim, a necessary element of their claim. On the contrary, the Boims did prove that Hamas killed David Boim, and the Court ruled as much in connection with the summary judgment motions; specifically, the Court held, based on the record, "that David Boim was murdered by Hamas activists, in a Hamas-sponsored attack, and that no

reasonable jury could find otherwise." *Boim v. Quranic Literacy Institute,* 340 F.Supp.2d 885, 899 (N.D.Ill.2004). The evidence supporting that finding was overwhelming. Indeed, Defendants IAP/AMS conceded that Hamas was responsible for David's murder. The Court's ruling in that regard is binding at the trial stage.

As an alternative to granting judgment as a matter of law, QLI asks the Court to grant a new trial because: (1) the Boims failed to prove an element of their claim; (2) the verdict was against the clear weight of the evidence; (3) the Court denied QLI's motion for a continuance of the trial; (4) QLI's rights were adversely affected by the Court's rulings; and (5) the damages were excessive. The Court quickly rejects QLI's first two arguments; as explained above, the Boims *did* prove each element of their claim and the verdict was supported by substantial probative evidence.

Turning next to QLI's claim that the damages award was excessive, the Court simply cannot agree. The Court acknowledges that the jury's award was substantial-even before the mandatory trebling. But a jury's award may not be vacated unless it is "monstrously excessive"-so high that it can only be the result of passion and prejudice-or when it has "no rational connection to the evidence." *See, e.g., Honda Motor Company v. Oberg,* 512 U.S. 415, 422-23, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *Kossman v. Northeast Illinois Regional Commuter Railroad Corp.,* 211 F.3d 1031, 1037 (7th Cir.2000). That is not the case here.

The evidence established that David Boim was murdered by Hamas terrorists, and that the defendants had knowingly provided material support to Hamas. The plaintiffs sought damages for: David's lost benefits and wages, lost household services, lost guidance, loss of society, and mental anguish. At trial, both Stanley Boim and Joyce Boim testified, speaking in surprisingly even-keeled tones about the heart-wrenching pain and loss they have suffered because of David's murder. Among other things, they testified about their relationship with their son and the role David played in their family; they testified that David had intended to become a doctor. The Boims also presented Dr. Stan Smith, who testified about the pecuniary loss to the Boims from David's murder. While QLI did not cite to the record regarding Dr. Smith's testimony about the amount of the pecuniary loss, the Court's recollection is that he opined that it was in the $22 million range. Neither QLI, nor any of the other defendants, offered any evidence or argument to rebut or undercut this figure. Thus, the record evidence could have supported an award of $22 million just for the lost wages and benefits David would have provided to the Boims if he had lived.

And that does not even begin to account for the types of losses that would reasonably have made up the bulk of the award-the damages to cover the Boims' mental anguish. On this score, counsel for the Boims opted not to ask the jury for a particular dollar amount, choosing instead to ask the jury to award whatever it saw fit. Given the nature of the case (one seeking damages for the murder of a son in

a brutal and senseless terrorist act), and given the nature of the relationship between the victim and the plaintiffs (child/parent), the Court cannot say that the jury's award was "monstrously excessive" or that it lacked a rational connection to the evidence. It is high, but that is not surprising, given the nature of the case, and given that the defendants offered no alternative to the plaintiffs' pleas and figures.

Finally, the Court considers QLI's arguments that its rights were violated by the Court's refusal to continue the trial date and by the general way in which the Court handled the proceedings in this matter. QLI, like the other non-defaulting defendants, moved for summary judgment in its favor and against the Boims. The Court denied QLI's motion, finding that QLI had "attempted to provide an innocuous explanation for each of the Boims' allegations," but that "the record evidence is such that a jury should be permitted to decide whether those explanations are true." *Boim,* 340 F.Supp.2d at 927. In his current motion, Mr. Beal states that "it is evident that QLI has a substantively triable case." Yet, he chose not to try that case; he chose not to put on any evidence in QLI's favor, and he chose not to challenge or rebut any of the Boims' evidence. The Boims made their case to the jury; QLI declined to do so. Indeed, had the Boims not called Mr. Haleem as part of their case, the jury would have heard nothing from QLI; to the extent QLI is frustrated that it was not able to put more of its case before the jury-whatever that case would have been-it has no one to blame but itself.

Mr. Beal has argued that it was unfair to expect him to go to trial so soon after the Court issued its summary judgment rulings. But the trial date was set months before the summary judgment motions were even briefed, and the Court consistently indicated that the date was firm. At the very latest, Mr. Beal had notice by October 8, 2004, that the trial date was firm, and that Mr. Salah was not going to participate in the trial. *See* Transcript of Hearing on Motion to Reconsider, October 8, 2004 (attached as Exhibit K to the Boims' Response to QLI's Motion for Judgment as a Matter of Law). Moreover, given that the Boims moved for summary judgment against all of QLI's co-defendants, but did not move for summary judgment against QLI, Mr. Beal should have been prepared for the very real possibility that his client could be the only defendant left to go to trial.

In short, Mr. Beal's predicament was solely of his own making. He took a gamble that some of his co-defendants would be left standing in the wake of the summary judgment rulings, and he lost. He chose to sit on the sidelines in the months leading up to the trial-despite the Court's persistent warnings that the case would proceed to trial in December. Moreover, contrary to Mr. Beal's argument in his motion to postpone the trial and in the instant post-trial motions, Mr. Haleem made it clear to the Court that his main concern was that, in the wake of the September 11, 2001 incidents, he felt that his organization could not get a fair trial, regardless of when it was held. He characterized his decision not to participate as a "protest." The Court did its very

best to ensure that Mr. Beal and his client understood the risks they were taking by choosing to sit out the trial; Mr. Beal and Mr. Haleem both indicated that they knew what they were doing, and that they knew what they stood to lose. Having now lost, they can hardly be heard to complain about it.

Mr. Beal argues that QLI's rights were violated because the Boims were allowed to introduce evidence that should have been stricken from the record and because Mr. Haleem, who was called by the Boims to testify, was precluded by the Court from testifying fully and completely on certain matters. These are the exact types of pitfalls that counsel created by choosing to remain inactive throughout the trial. Our system of jurisprudence is adversarial-it is counsel's job to object to evidence he thinks might be prejudicial to his client, and it is counsel's job to elicit testimony in his client's favor. *See, e.g., United States v. Castro,* 540 U.S. 375, 386, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."). Thus, to the extent QLI's right to a fair trial was violated, QLI has no one to blame but itself and its lawyer; by choosing to proceed as it did, despite the Court's warnings, QLI waived any right it might have had to complain about any violation of that right.

The Court's analysis on QLI's motion for a new trial applies with equal force to the post-trial motions filed by HLF, IAP/AMS and Mr. Salah. In fact, it is

hard to believe that these defendants would actually expect the Court to conduct another trial when they did not even bother to show up for the first trial.

Conclusion

For the reasons set forth above, the Court denies QLI's Motion for Judgment as a Matter of Law or a New Trial [# 677], denies HLF's Motion for New Trial [# 678], denies IAP/AMS' Motion for New Trial [# 672], and denies Mr. Salah's Post-Trial Motion [# 679].

SUPPLEMENTAL APPENDIX B

United States District Court,
N.D. Illinois, Eastern Division.

Name of Assigned Judge or Magistrate Judge	Arlander Keys		
CASE NO.	00 C 2905	DATE	2/25/2005
CASE TITLE	Boim vs. Quranic Literacy, et al		

DOCKET ENTRY TEXT:

Plaintiffs' Motion to Amend Final Judgment is granted. The Amended Final Judgment issued herein on 2/18/05 is hereby further amended to reflect that final judgment is also entered against Defaulting Defendants American Middle Eastern League for Palestine ("AMELP") and the United Association for Studies and Research ("UASR"). Said Defendants are jointly and severally liable to Plaintiffs, along with the other Defendants named in the Amended Final Judgment, in the amount of One Hundred and Fifty Six Million Dollars ($156,000,000.00). AK

Notices mailed by Chambers Staff

(4)

No. 08-1441

Supreme Court, U.S.
FILED
SEP 16 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STANLEY BOIM, individually and as administrator of the ESTATE OF DAVID BOIM, deceased, and JOYCE BOIM,

Petitioners,

v.

MUHAMMAD ABDUL HAMID KHALIL SALAH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners' question skims on the surface of misrepresenting the Seventh Circuit's holding. Consistent with *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S. Ct. 1439 (1994), the Circuit Court criticized the panel's holding that aiding and abetting liability was available under 18 U.S.C. § 2333; however, it never definitively reached the question. Rather, it focused on an "alternative and more promising ground for bringing donors and terrorist organizations within the grasp of section 2333." *Boim v. Holy Land for Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008) (*en banc*) ("*Boim III*").[1] Instead of relying on aiding and abetting liability, the Circuit Court held that providing material support (e.g., funding) to a terrorist organization provides the basis for *primary liability* so long as that support was provided after 1994, when 18 U.S.C. § 2339A was enacted. Contrary to the implication in Petitioners' question presented, *Boim III* does not "bar victims of international terrorism from recovering damages from aiders and abettors of terrorist acts." Petition at i. Rather it allows liability to reach those who provide support, financial and otherwise, to a terrorist organization, unless the funding took place before 1994—as in the case of Respondent, Muhammad Salah.

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1. The dissent describes the holding of the majority as "express[ing] doubts about" the availability of aiding and abetting liability which "in the end neither accepts nor rejects the panel's holding that aiding and abetting liability is permitted under 18 U.S.C. § 2333." *Boim III*, 549 F.3d at 720 (Wood, J., dissenting).

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REASONS FOR DENYING THE PETITION

First, there is no split in the circuits on the legal issue raised in this petition. In fact, *no other circuit court* has considered the application of *Central Bank* to the statute at issue here, 18 U.S.C § 2333. Any consideration by this Court is premature prior to other circuits having the opportunity to render what very well may be unanimous opinions on the legal question presented.

Second, this case concerns a death that occurred on May 13, 1996 and alleges conduct by Respondent which, it is uncontested, took place before January 25, 1993. Therefore, the Respondent's conduct took place long before several of the pertinent statutes were enacted. This *sui generis* fact pattern will not be repeated, rendering this a particularly inappropriate case for consideration by this Court. In fact, in explaining the impact of the shift in the legal underpinnings giving rise to liability under § 2333, the *en banc* court stated: "Few future cases will be affected by the timing issue, because few such cases will involve donations that were made after section 2333 was enacted in 1990 or re-enacted in 1992 but that ceased before 1994."[2] *Boim III*, 549 F.3d at 691. This observation by the Circuit Court regarding the impact of its shift in analysis makes this a particularly inappropriate case for this Court to grant certiorari.

Third, Petitioners' request this Court to grant certiorari to find that 18 U.S.C. § 2333 allows aiding and

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2. The truth of this statement renders the arguments raised by amici, Zionist Organization of America, unpersuasive.

abetting liability. However, the original circuit case in this matter, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) ("*Boim I*"), found that aiding and abetting liability was available. The parties then litigated the case for several years understanding this to be the operative standard. Following disposition on the merits, the panel affirmed its previous holding that aiding and abetting liability was available, but found that Petitioners had failed to establish actual or proximate cause as required for secondary liability under traditional tort principles. *Boim v. Holy Land Found.*, 511 F.3d 707 (7th Cir. 2007) ("*Boim II*"). *Boim II*, which adopted Petitioners' position regarding aiding and abetting liability, spelled out in great detail how the Petitioners had presented woefully inadequate admissible evidence to establish that Salah's conduct was a cause in fact of David Boim's murder. Knowing they had no evidence of causation to present on remand, the Petitioners requested the rehearing by the entire Seventh Circuit. Therefore, if this Court grants the relief requested, Petitioners will be in the same position they were in prior to the *en banc* hearing and will face a remand to the district court for what will be vigorously contested litigation regarding their inability to establish proximate and actual causation between Respondent's alleged conduct and the injury suffered. This too renders this case inappropriate for certiorari.

Finally, Petitioners' primary basis for requesting this Court to revisit the Circuit's holding, which paved the way for liability findings against the organizational defendants' liability, is because "[a]pproximately 1.4 million dollars in bank accounts and safe deposit boxes held in respondent Salah's name . . ." was seized by the

FBI in June of 1998 and would be able to "satisfy [Petitioners'] judgment . . . if respondent Salah were held liable." Pet. at 9. Assisting individual Petitioners to collect on a judgment is not a proper basis to grant certiorari.

STATEMENT OF THE CASE

A. SALAH'S ARREST AND IMPRISONMENT IN ISRAEL

This factually complex case alleges conduct by Respondent, Muhammad Salah ("Salah" or "Respondent"), that terminated on January 25, 1993, when Salah, a Palestinian-American, was arrested by Israeli military authorities. While in Israeli custody, Salah purportedly gave statements regarding the operations of Hamas and his role in disbursing roughly $140,000 in the West Bank prior to his arrest. Salah argued that these purported statements made while in the custody of the Israeli authorities should be disregarded because they were made under conditions of duress and coercion, including the threat and use of physical torture. In support of these assertions, Salah produced U.S. Embassy cables written by the United States Consulate in Tel Aviv who visited Salah and sent reports to Washington. According to the March 4, 1993 cable:

> Mr Salah had made allegations of mistreatment very similar to those made to U.S. consul [by others] those include confinement in a punishment cell known as the 'refrigerator' and threatened beatings for failure to sign a Hebrew language statement.

> Mr. Salah stated that during his initial interrogation he was forced to stand naked in front of his interrogator and threatened with a beating if he failed to sign a statement.

(Embassy Cables at Bates No. S0242).[3] According to another cable, Salah reported "two of his three interrogators have become more aggressive . . ." and that "he was hooded, tied with his arms behind him and forced to sit in a low stool." (Embassy Cables at Bates No. S0253). On the fourth consular visit, Salah explained "that a Major Haim had threatened to beat him as he stood naked in a room, and said he signed the statement to avoid the beating. As to his current conditions Mr. Salah says that he is still isolated. He spends each week in the interrogation room but is rarely interrogated now. His weekends are in the small, closet-like enclosure called the 'refrigerator.'" (Embassy Cables at Bates No. S0257). In November 1993, the consular official reported,

> It appears that the conditions of Salah's imprisonment were worse than we had originally been informed. During his confinement, he was kept in a room measuring 3 feet by 5 feet in which he positions himself diagonally in order to sleep . . . Salah is currently in a cell with 20 other prisoners. They have to rotate to sleep on the floor. The rooms are cold, and there is no hot water. Very often there is no running water at all.

(Embassy Cables at Bates No. S0300).

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3. The Embassy Cables were attached to Salah's Response to Plaintiffs' Motion for Summary Judgement. R. 289.

During a hearing before the military court, the GSS interrogator admitted that Salah was interrogated without interruption for more than 24 hours, that loud music was played in the detention center, and that Salah was threatened with 20 years imprisonment without a trial. According to a cable from September of 1993, Salah "was threatened with a life sentence . . . if he continued to insist on a trial and was told that his only hope for a lesser sentence was to agree to a plea bargain." (Embassy Cables at Bates No. S0284). In fact, the next month, in October of 1993, after Salah refused to accept a plea bargain, the court granted the prosecution's request to add another set of charges to his charge sheet. (Embassy Cables at Bates S0291). Despite this evidence, the magistrate judge, without a hearing, credited these statements in granting summary judgment in favor of the Petitioners. *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 914-916 (N.D. Ill. 2004).

Salah fared no better in the military tribunal that presided over his case. When the military court ordered Salah's prosecutors to submit classified documents regarding GSS interrogation guidelines to the court for its review, the GSS flatly refused. Instead of compelling the GSS to comply with its decision, the military court rescinded its order, stating that it could not require the GSS to comply. At another court appearance, a representative of the American Embassy attended and filed the following report: "the prosecution refused to allow Mr. Salah to speak, indicating to the Judge that Salah was under a special order prohibiting him from talking to anyone and that [even] the court would have to be cleared." (Embassy Cables at Bates No. S0242).

The military court judge "brought Salah and the prosecutor privately into his chambers, with the U.S. Vice-Consul present, the judge informed Salah that he could talk about anything *except* his interrogation and the charges." *Id.* Ultimately, responding to threats of long prison terms, Salah pled guilty to "membership and activity in an illegal organization" and an Israeli military court sentenced Salah to five years imprisonment.

B. PETITIONERS' COMPLAINT

On May 13, 1996, Petitioner's son, David Boim, was killed by shots fired from a passing car while waiting with other students at a bus stop near Beit El in the West Bank. The Complaint alleged that the shooters, Amjad Hinawi ("Hinawi") and Khalil Tawfiq Al-Sharif ("Al-Sharif"), were both members of Hamas and that Salah and the organizational defendants are liable because of support they provided to Hamas. By May 13, 1996, Salah had been imprisoned continuously by Israeli authorities for approximately 40 months. There was no evidence that Salah gave money to Hamas, or to anyone whom Petitioners contend works for Hamas, after January 1993. There was no evidence that Salah has ever met or communicated with Hinawi or Al-Sharif, or that Hinawi or Al-Sharif ever received any money, weapons, transportation, or training directly from Salah.

In terms of Salah's pre-January 25, 1993 alleged involvement with Hamas, Salah denied Petitioners' allegations in his Answer and Amended Answer to the First Amended Complaint. R. 208, 234. However, in July of 2004, while the present case was pending, the

United States indicted Salah and charged him, based on this same 1993 conduct, with membership in a RICO conspiracy, the RICO enterprise being Hamas.[4] *Boim*, 340 F. Supp. 2d at 894. In order not to compromise his defense in the criminal case, Salah responded to all substantive questions at his deposition by invoking his Fifth Amendment right to avoid self-incrimination. The district court accordingly struck his Answer.

ARGUMENT

A. THERE IS NO SPLIT IN THE CIRCUITS; IN FACT, NO OTHER CIRCUIT COURT HAS CONSIDERED THE QUESTION.

Aside from the Seventh Circuit, no circuit court has considered whether *Central Bank*, 511 U.S. 164, when applied to an action filed pursuant to 18 U.S.C. § 2333, forbids or allows secondary liability based upon aiding and abetting. That alone is reason to deny the petition. The question of whether a statutory cause of action allows for aider and abettor liability is one of interpretation of congressional intent, which necessarily must be decided in the context of the particular statute in question. If the question of whether aiding and abetting liability under § 2333 is to be considered by this Court, the prudent path is to allow other circuits to

4. The Petitioners fail to inform the Court that, in addition to being convicted of obstruction, Salah was acquitted by a unanimous jury of the far more serious charge, operating the criminal enterprise of Hamas. Pet. at 5; *United States v. Salah*, No. 03 CR 978 (N.D. Ill.) (St. Eve, J.). Moreover, a month prior to the criminal trial, the government dismissed any charges of providing material support to Hamas.

issue opinions on the matter, and then discern whether there is even a conflict to resolve. Because Petitioners cannot argue a split in the circuits, they frame the issue as a "conflict among federal courts over whether" *Central Bank* applies to all instances of aiding and abetting. Pet. at 14. This is neither an accurate assessment of the state of the law nor the situation addressed in Supreme Court Rule 10(a).

First, several cases, consistent with the Circuit opinion, rely on *Central Bank* to refuse to allow aider and abettor liability where the pertinent statute is silent on the matter. *Freeman v. DirectTV, Inc.*, 457 F.3d 1001, 1007 (9th Cir. 2006) (no aider and abettor liability under the Electronic Communications Privacy Act, which imposes civil liability on providers of electronic communication services that knowingly divulge the contents of those communications); *Jones v. Global Info. Group, Inc.*, No. 3:06-00246-JDM, 2009 WL 799743 (W.D. Ky. March 25, 2009) (quoting *Boim III* approvingly and finding no aider and abettor liability under 18 U.S.C. § 2707, the Stored Wire and Electronic Communications and Transactional Records Access Act); *City of New York v. Milhelm Attea & Bros., Inc.*, No. 06-CV-3620, 2009 WL 701005, *6 (E.D.N.Y. March 11, 2009) (no aider and abettor liability under the Contraband Cigarette Trafficking Act). *See also Rothstein v. UBS AG*, No. 08 CIV 4414, 2009 WL 2581610, *3, n.2 (S.D.N.Y. Aug. 23, 2009) (recognizing that in *Boim III*, the Seventh Circuit held that "statutory silence on the subject of secondary liability means that there is none; and section 2333(a) does not mention aiders and abettors or other secondary actors"). The only circuit case that extends aiding and abetting liability post *Central Bank* is a Second Circuit

per curiam opinion arising out of the Alien Tort Claim Act ("ATCA"). In *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam), *aff'd sub nom. American Isuzu Motors, Inc. v. Ntsebeza*, __U.S. __, 128 S. Ct. 2424 (2008)(affirming pursuant to 28 U.S.C. § 2109 because of absence of a quorum of qualified justices), the Court disallowed plaintiffs' claim for aiding and abetting under the Torture Victim Protection Act ("TVPA") to proceed past the dismissal stage, but allowed an aiding and abetting claim to proceed under the ATCA. *See also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1171 (C.D. Cal. 2005) (before dismissing the TVPA action pursuant to the political question doctrine, opining that although the plaintiffs did not plead an aiding and abetting theory, *Central Bank* can be distinguished in the TVPA context because *Central Bank* involved an implied right of action, whereas TVPA provides an express right of action).

Finally, there are two district court opinions, decided before the *en banc* opinion in *Boim III*, that adopt *Boim I* and allow plaintiffs to proceed on an aiding and abetting theory for liability under 18 U.S.C. § 2333. Both of these cases arise in the same district court in New York. *See Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (adopting the reasoning in *Boim I* to allow the case to proceed under a theory of aiding and abetting liability); *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 WL 1867060, * 3 (E.D.N.Y. June 30, 2006) ("Both parties cite [*Boim I*] . . . [and] the Court . . . adopts its reasoning."). If the Second Circuit is asked to review one of these decisions, it will now have the benefit of the entire Seventh

Circuit's thinking on the matter. This Court should not grant certiorari until the Second Circuit has had an opportunity to consider the question.[5]

B. THIS CASE IS *SUI GENERIS* AS RECOGNIZED BY THE CIRCUIT OPINION.

Second, this case was filed on the eve of the expiration of the statute of limitations–meaning 4 years had lapsed between the murder and the Complaint in this case. Moreover, for the 40 months prior to the murder, Salah sat in an Israeli military prison. Therefore, Salah's conduct at issue took place long before several of the pertinent statutes at issue were enacted. The fact that Salah's relevant conduct took place well before the pertinent statutes were enacted led the Court of Appeals to determine that Respondent Salah could not be held liable. This *sui generis* fact pattern, not possible of being repeated given the lapse of time, renders this case particularly inappropriate for

5. Two other district cases out of the Eastern District of New York cite *Boim I* approvingly, but essentially rely on the analysis contained in *Boim III* to find liability may affix to defendants. *Weiss v. National Westminster Bank PLC*, 453 F. Supp. 2d 609, 613 (E.D.N.Y. 2006) ("Violations of 18 U.S.C. § 2339B and § 2339C are recognized as international terrorism under 18 U.S.C. 2333(a))(citations omitted); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007)(essentially adopting the strict liability standard approved in *Boim III*, "violations of Sections 2339A, 2339B(a)(1), and 2339C can serve as predicate crimes giving rise to liability under the [Anti-Terrorism Act]. . . . Thus . . . plaintiffs have sufficiently alleged that they were injured by reason of an act of international terrorism.") (citations omitted).

consideration by this Court. In fact, in explaining the impact of the shift in the legal underpinnings establishing liability–shifting from aiding and abetting liability to "a chain of explicit statutory incorporations by reference" that allowed for a broader basis of primary liability, the *en banc* court stated:

> Only because this is a very old case–David Boim was killed 12 years ago–does the 1994 effective date of section 2339A, two years before the killing, present an obstacle to liability, though only with respect to Salah and possibly Holy Land Foundation.... Few future cases will be affected by the timing issue, because few such cases will involve donations that were made after section 2333 was enacted in 1990 or re-enacted in 1992 but that ceased before 1994.

Boim III, 549 F.3d at 691.

A case so unique and so limited in its practical import is not appropriate for certiorari.

C. A REVERSAL OF THE CIRCUIT COURT'S HOLDING WOULD REQUIRE A REMAND TO THE DISTRICT COURT FOR A DETERMINATION OF WHETHER THE PETITIONERS CAN ESTABLISH CAUSATION WHICH, AFTER NINE YEARS OF LITIGATION, PETITIONERS HAVE THUS FAR FAILED TO DO.

Petitioners were granted summary judgment by the district court on a theory that Salah had aided and abetted Hamas, and was therefore liable for the murder of David Boim. Salah conceded his invocation of his Fifth Amendment rights rendered him unable to contest a finding that he provided funding to Hamas prior to January of 1993. However, he vigorously disputed that such a contribution would be enough to establish his liability as an aider and abettor, under common law tort principles, for a random act committed over 40 months after his arrest.[6] Salah appealed that ruling and the panel opinion reversed, finding that the magistrate judge had failed to require plaintiffs to show any proximate and actual causation as to either Salah or the two organizational defendants against whom summary judgment had been granted.[7] Unhappy with this ruling,

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6. The evidence regarding the two organizational defendants against whom summary judgment was granted did not establish any funding to Hamas, but rather established funding to *zakat* committees that ran charitable organizations like hospitals, which were run by members of Hamas. *Boim III*, 549 F.3d at 706 (Rovner, J., dissenting)

7. The Panel also found that Petitioners had failed to produced sufficient evidence to establish that Hamas was (Cont'd)

even though the panel adhered to Petitioners' current position that aiding and abetting liability was available, Petitioners sought a rehearing *en banc*.

What the *en banc* holding did was to obviate the requirement that Petitioners establish the elements required in every common law tort action: causation. Instead, the Circuit Court held that providing funding was enough to establish liability. The *en banc* opinion obviated the causation requirement by what it referred to as a "a chain of explicit statutory incorporations by reference." *Boim III*, 549 F.3d at 690. This statutory gymnastics made it possible for Petitioners to hold the organizational defendants liable; hence, Petitioners are not seeking certiorari against those defendants. But these statutory gymnastics required dismissing the case against Salah because of the undisputed cut-off date of his involvement. The resulting *en banc* opinion imposes strict liability on funders of terrorist organizations, describing the statutory path as "an alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333." *Boim III*, 549 F.3d at 690. While the Petitioners lost the battle in terms of Salah's liability, they won the war in terms

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(Cont'd)

responsible for the killing of David Boim, a fact necessary to link Salah to the injury at all. *See Boim III*, 549 F.3d at 715 (Rovner, J., dissenting) (criticizing the sources, including newspaper accounts, and hearsay testimony based on newspaper accounts, websites, and unauthenticated documents in Arabic, relied upon by the plaintiffs' expert to opine that Hamas was responsible, "the glaring lack of any information confirming the authenticity and accuracy of [the expert's] sources raises obvious doubts about the reliability of his opinions. . . .").

of relaxing the requirement under § 2333 that Plaintiffs comply with traditional tort principles and establish causation. *See Boim III*, 549 F.3d at 724 (discussing why dispensing with the causation requirement is ill-advised) (Wood, J., dissenting).

Relief in this Court, a finding that Petitioners can pursue liability against Salah on the basis of aiding and abetting, is exactly what Petitioners attempted to do during the first seven years of this litigation. *Boim II* found they had failed. Prevailing in this Court will put the Boims exactly where they were throughout this litigation, facing standards that the Panel found they did not achieve and the Circuit all but admitted were more difficult to meet.

This undeniable truth makes this case uniquely inappropriate for this Court's review.

D. ASSISTING A PARTY TO COLLECT ON A JUDGMENT IS NOT A PROPER BASIS TO GRANT CERTIORARI.

As Supreme Court Rule 10 makes clear, the grant of a petition for certiorari, which is not a matter of right, requires "compelling reasons." In dismissing a writ of certiorari in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923), the Court defended its careful consideration of certiorari:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to

> dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

The holding in this case, while significant to both the Petitioners and the Respondent, presents no reason for this Court to examine it. In fact, the section of the Petition addressing the issue why this Court should hear the case essentially argues that Respondent has assets, seized by the federal government in an unrelated action, which could be used to pay the judgment. Pet. at 9. In addition to that not providing an appropriate basis for this Court to exercise its discretion to hear a case, Petitioners' assertions of the monies involved in the forfeiture action are wildly inaccurate. Moreover, even if that kind of money were sitting in a seized account, it is not at all clear that Petitioners would prevail on a claim to such funds. In any event, the collection of the judgment in this matter is of no concern to this Court. Certiorari must be denied.

CONCLUSION

Respondent respectfully requests this Court to deny the petition for a writ of certiorari.

Dated: September 16, 2009

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IN THE

Supreme Court of the United States

STANLEY BOIM, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID BOIM, DECEASED, AND JOYCE BOIM,
Petitioners,

v.

MUHAMMAD ABDUL HAMID KHALIL SALAH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE
Supreme Court of the United States

No. 08-1441

STANLEY BOIM, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID BOIM, DECEASED, AND JOYCE BOIM,
Petitioners,

v.

MUHAMMAD ABDUL HAMID KHALIL SALAH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

I.

THE SEVENTH CIRCUIT'S DECISION APPLIED THE *CENTRAL BANK* HOLDING TO ANTI-TERRORISM LEGISLATION

Respondent challenges our statement of the Question Presented on the ground that the decision of the Seventh Circuit "never definitively reached the question." Brief in Opposition, p. i. In fact, it is

clear to any reader of the sixth through tenth paragraphs of the Seventh Circuit's opinion (beginning with "Section 2333 . . ." through the paragraph that begins "To read secondary liability into section 2333(a) . . ."; Pet. App. A, pp. 4a-6a) that the court below applied the rule of *Central Bank* to this case and rejected the legal theory that had been approved by the district court and by the two panel opinions. Indeed, had the Seventh Circuit not determined that there could not be aiding-and-abetting liability under Section 2333, it would not have instructed, as it did (Pet. App. A, p. 41a), that the judgment regarding respondent Salah be "reversed with instructions to enter judgment in his favor." If secondary liability were conceivably available under Section 2333, the judgment against respondent Salah would have been affirmed on that ground or, at the very least, the case against him would have been remanded for further proceedings.

II.

THERE IS A CONFLICT BETWEEN THE SEVENTH AND SECOND CIRCUITS AND THE LEGAL ISSUE IS IMPORTANT

Respondent cites several cases in which the rule of *Central Bank* has been applied to statutes authorizing civil actions in regulatory areas where the primary tortfeasor has engaged in conduct that is *malum prohibitum* and not *malum in se*. The rule of *Central Bank* may, indeed, be applicable to violations of federal statutes such as the Electronic Communications Privacy Act, the Stored Wire and

Electronic Communications and Transactional Records Access Act, and the Contraband Cigarette Trafficking Act. *See* Brief in Opposition, p. 8.

But no federal appellate decision before the Seventh Circuit's ruling in this case applied *Central Bank* to federal anti-terrorism law. Those who aid and abet organizations that engage in murder and other forms of violence against civilian populations are, we submit, in a very different posture than aiders and abettors of trafficking in contraband cigarettes. Respondent acknowledges that the Second Circuit in *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd sub nom. American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008), permitted a claim under a federal anti-terrorism statute to proceed on an aiding-and-abetting theory. That ruling conflicts with the decision of the Seventh Circuit in this case. District Courts in the Central District of California and in the Eastern District of New York have also followed the same course in terrorism cases. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1171 (C.D. Cal. 2005); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005); *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 WL 1867060 (E.D.N.Y. June 30, 2006).

Moreover, the governing legal issue – whether civil liability may be imposed against secondary tortfeasors who aid and abet conduct prohibited by federal law with respect to terrorist organizations – is an important question. It potentially affects the entire network of federal laws that deter conduct

within the United States that promotes international terrorism. There is no reason whatever to narrow the scope of these laws and to shield against civil liability persons or organizations that engage in various forms of secondary conduct that would qualify for civil liability under common-law aiding-and-abetting and conspiracy law.

The legal issue presented by this petition is not, as the respondent asserts, "unique and . . . limited in its practical import." Brief in Opposition, p. 11. When the case was first appealed to the Seventh Circuit, the United States was asked to file a brief *amicus curiae* and its brief supported petitioners' position that there was aiding-and-abetting liability under Section 2333. Although the legal issue arises in a unique and distinctive context, it has broad ramifications.

III.

THIS IS AN APPROPRIATE COMPANION CASE TO *HOLDER v. HUMANITARIAN LAW PROJECT*, Nos. 08-1498, 09-89

On September 30, 2009, the Court granted certiorari in *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89. The issue in that case is whether the terms "service," "training," and "expert advice or assistance" in 18 U.S.C. § 2339B(a)(1) are unconstitutionally vague and must, therefore, be read out of the applicable anti-terrorism law. The issue presented by this case should be heard and decided by the Court in tandem with the

Humanitarian Law Project case for at least two reasons:

First, if a majority of this Court were to agree with the Ninth Circuit's decision that those who assist a foreign terrorist organization with service, training, expert advice or assistance cannot constitutionally be held liable under Section 2339B(a)(1) because the statutory terms are too vague, the issue presented in this case would come to the fore. May such individuals or organizations (who must be shown, in any event, under 18 U.S.C. § 2339B(a)(1) to "have knowledge that the organization . . . has engaged or engages in terrorist activity") be held liable as aiders and abettors or co-conspirators?

Second, if a majority of this Court were to reverse the decision of the Ninth Circuit in the *Humanitarian Law Project* case, the aiding-and-abetting issue would remain important. Are individuals or organizations that do not themselves provide the kinds of assistance enumerated in Section 2339B(a)(1) but aid and abet such conduct by others liable under federal law? Does the rule of *Central Bank* apply to the conduct specified in the amendment to Section 2339B(a)(1) by the 2004 Intelligence Reform and Terrorism Prevention Act? To be sure, that Section now prescribes a severe criminal penalty for anyone who "conspires" to provide material support or resources, but it is not clear from the statutory language whether there is civil liability for acts that constitute aiding-and-abetting.

IV.

THE MEANING OF ANTI-TERRORISM LEGISLATION IS NOT A SUBJECT TO WHICH THIS COURT SHOULD APPLY ITS USUAL RULES REGARDING CIRCUIT CONFLICTS

Respondent argues that certiorari should be denied at this time because "the prudent path is to allow other circuits to issue opinions on the matter, and then discern whether there is even a conflict to resolve." Brief in Opposition, pp. 7-8. There is, as we have noted, already a conflict between the Second and Seventh Circuits. In any event, the subject-matter is not one that warrants recourse to this Court's usual "prudent path" of awaiting decisions by various courts of appeals before considering the legal issue.

Anti-terrorism legislation is enacted to deter conduct in the United States that may facilitate the commission of grievous international offenses and the recurrence anywhere in the world of the historic crime of 9/11. Delay in resolving critical legal issues that affect the deterrent impact of federal legislation in this area just so that this Court will have the benefit of views of various lower-court federal judges is simply inappropriate and dangerous. The "prudent path" that this Court may follow when legal issues concern less urgent federal programs should not be invoked to delay resolution of the issue presented by this case. Its disposition might well deter an aider-and-abettor who would, so long as the legal issue of his liability is unresolved, choose to assist a terrorist

organization and thereby contribute to the commission of an act of violence that harms civilians.

V.

RESPONDENT'S COMPLICITY IN HAMAS MURDER AND VIOLENCE HAS BEEN CONCLUSIVELY ESTABLISHED

In a patent effort to portray the respondent as a victim -- rather than the major perpetrator of international terrorism that he truly is -- the Brief in Opposition sets out in great length respondent's false and discredited allegations of mistreatment and coercion after he was arrested in Israel. Brief in Opposition, pp. 3-6. These same fabricated assertions were heard and rejected following a 13-day hearing in *United States v. Marzook*, 435 F. Supp. 2d 708, 777 (N.D. Ill. 2006), and they were refuted during a deposition of respondent's Israeli counsel in this case. In his briefs in the court of appeals respondent acknowledged that, notwithstanding assertions he had made of coercion by Israeli authorities, he was "not in a position to dispute" the district court's findings of his substantial assistance to Hamas. Brief and Appendix of Defendant-Appellant Muhammad Salah, pp. 13-14, fn. 8 & 9.

Rather than testify during discovery in this case, respondent invoked his privilege against self-incrimination. In a supplemental brief filed in the court below after en banc rehearing had been

granted, respondent acknowledged that "[b]ecause Salah invoked his right against self-incrimination, the Boims were entitled to a negative inference against him regarding his conduct and intent" so that "it is presumed for purposes of this appeal that Salah contributed money to Hamas in January 1993 for the express purpose of furthering its violent activities." Defendant-Appellant Muhammad Salah's Supplemental Brief for Rehearing *En Banc*, pp. 4-5.

Respondent was, in fact, convicted after a jury trial in federal court of having committed obstruction of justice in this case by submitting false answers to the petitioners' interrogatories. Although we acknowledge that the injustice of the Seventh Circuit's decision freeing him of liability to the petitioners for the murder of their son is not, standing alone, a reason to grant our petition for certiorari, this Court should not be misled into believing that it has before it a person with clean hands.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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No. 08-1441

IN THE

Supreme Court of the United States

STANLEY BOIM, individually and as administrator of the ESTATE OF DAVID BOIM, deceased, and JOYCE BOIM,

Petitioners,

—v.—

MUHAMMAD ABDUL HAMID KHALIL SALAH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE ZIONIST ORGANIZATION OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF OF THE ZIONIST ORGANIZATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE ZIONIST ORGANIZATION OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Zionist Organization of America (ZOA) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari submitted by Stanley Boim, individually and as administrator of the Estate of David Boim, deceased, and Joyce Boim.

Counsel of record received timely notice of the ZOA's intention to file an *amicus curiae* brief. In a written response, counsel for the Respondent, Muhammad Abdul Hamid Khalil Salah, did not consent to the filing of the brief, but indicated that Respondent would not object to its filing—a response which should weigh in favor of the Court granting the ZOA leave to file the brief.

The ZOA's interest in this case is based on our longstanding commitment to fighting international terrorism and advocating for justice for American terror victims. We have initiated and backed federal legislation that would hold accountable countries that promote and support terrorism, including the Saudi Arabia Accountability Act and the Syria Accountability Act. The ZOA has urged the U.S. government to seek and prosecute terrorists who have killed or harmed Americans overseas. We achieved a partial victory when the U.S. State Department posted information about wanted terrorists who had killed American citizens in the Middle East on the Department's Rewards for Justice Web site.

The ZOA has also fought terrorist use of the Internet. We helped bring about the shutdown of 10 Web sites that were promoting terrorism against Americans and Israelis.

The ZOA led a three-year effort for the passage of the Koby Mandell Act, which created a new office in the U.S. Department of Justice dedicated to investigating and prosecuting foreign nationals who have killed or harmed Americans overseas. The legislation was named for an American child who immigrated to Israel with his family in 1994. In 2001, while out hiking, 13-year-old Koby and a friend were stoned to death by Palestinian Arab terrorists. When the Act was passed in 2004, Sherri Mandell, Koby's mother, publicly thanked the ZOA and Congress "for initiating this fight for justice." Stephen Flatow, Esq., the father of Alisa Flatow, another American victim of Palestinian Arab terrorism, also publicly thanked the ZOA "for being the only organization to have made this Bill and this fight a priority and being relentless in their pursuit of justice."

The Petitioners' brief explains why the ruling of the Court of Appeals for the Seventh Circuit misapplies this Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The Petitioners' brief also shows that there is conflict among the federal courts over whether this Court's decision in *Central Bank* applies to all instances of aiding-and-abetting liability.

The ZOA's proposed brief does not cover these matters. Rather, it focuses on the important public policy issues that necessitate a broad reading of 18 U.S.C. § 2333, which provides civil remedies to American victims of international terrorism. The

ZOA's brief shows that Congress intended Section 2333 to be construed broadly to include aider-and-abettor liability. The brief also discusses how imposing aider-and-abettor liability under Section 2333 will help us win the war against terrorism and ensure that American terror victims can obtain the fullest and fairest measure of justice.

For the foregoing reasons, the ZOA's motion for leave to file the attached brief as *amicus curiae* should be granted.

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National Counterterrorism Center: Annex [to the 2006 Country Reports on Terrorism] of Statistical Information (2007), http://www.state.gov/s/ct/rls/crt/2007/103716.htm 4

Miscellaneous

Debra M. Strauss, *"Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism,"* 19 Duke J. Comp. & Int'l L. 307 (2009) ... 4

Jewish Virtual Library, *American Victims of Mideast Terrorist Attacks*, http://www.jewishvirtuallibrary.org/jsource/Terrorism/usvictims.html (last visited August 12, 2009) 3

BRIEF OF THE ZIONIST ORGANIZATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae is the Zionist Organization of America (ZOA), the oldest pro-Israel organization in the United States whose leaders have included U.S. Supreme Court Justice Louis Brandeis.[1] Founded in 1897, the ZOA has been on the front lines in combating terrorism and seeking justice for American terror victims.

The ZOA has initiated and supported legislation to hold accountable countries that support terrorism. The ZOA has fought terrorist use of the Internet, helping to shut down 10 terror-promoting Web sites. The ZOA also spearheaded the bill that became the Koby Mandell Act, which created an office in the U.S. Department of Justice dedicated to investigating and prosecuting foreign nationals who have killed or harmed Americans overseas.

In submitting this brief in support of the petition for a writ of certiorari, the ZOA seeks to ensure that anti-terrorism laws are enforced as intended by Congress, the war on terrorism proceeds full force by holding aiders and abettors of terrorism accountable for their conduct, and terror victims can obtain the justice they deserve.

[1] Counsel of record received timely notice of *amicus curiae*'s intention to file this brief. Respondent's counsel did not consent to the filing, but indicated that Respondent would not object to the filing. No counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation and submission.

SUMMARY OF ARGUMENT

18 U.S.C. § 2333 should be construed to include aider-and-abettor liability in order to implement congressional intent, win the war against terrorism, and provide full and fair redress to terror victims.

ARGUMENT

I. Congress Intended Section 2333 to Cover Aider-and-Abettor Liability

18 U.S.C. § 2333 allows U.S. nationals injured "by reason of an act of international terrorism" to sue and recover treble damages. 18 U.S.C. § 2333(a). Congress defined "international terrorism" broadly, as "activities that . . . *involve* violent acts or acts dangerous to human life . . . ." 18 U.S.C. § 2331(1)(A) (emphasis added). The phrasing indicates congressional concern with all those who participate in violent or dangerous acts, not simply those who actually commit them.

Section 2333's legislative history supports this conclusion. See 136 Cong. Rec. S4568-01 at S4593 (1990) (statement of Sen. Grassley) (the legislation would "set an example to the world of how the United States legal system deals with terrorists. If terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them."); S. Rep. No. 102-342, at 22 (1992) (the "provisions for compensatory damages, treble damages, and *the imposition of liability at any point along the causal chain of terrorism*," would "interrupt, or at least imperil, the flow of money") (emphasis added). Congress intended that not only

terrorist actors be held accountable, but also those who fund, support and enable them.

II. The War Against Terrorism Requires that Aiders and Abettors be Subject to Civil Liability

At the time that the Anti-Terrorism Act of 1990 was introduced, there were "several alarming trends in terrorist attacks against U.S. citizens over the course of the last ten years, during which time approximately 384 American citizens were killed." 136 Cong. Rec. S4568-01 at S4594 (1990) (statement of Sen. Heflin).

International terrorism remains of paramount concern. Approximately 700 Americans have been killed and 1,600 wounded in Mideast-based terror attacks since 1970. Jewish Virtual Library, *American Victims of Mideast Terrorist Attacks*, http://www.jewishvirtuallibrary.org/jsource/Terrorism/usvictims.html (last visited Aug. 12, 2009). Since the late Yasser Arafat, leader of the Palestinian Arab people, supposedly renounced terrorism as part of the 1993 Oslo Peace Accords, at least 53 Americans have been murdered and at least 83 Americans have been injured by Palestinian Arab terrorism. *Id.*

In 2008 alone, there were five U.S. citizen kidnappings, and 33 U.S. citizen fatalities, as the result of terror attacks internationally. National Counterterrorism Center, *2008 Report on Terrorism* 25, 32 (Apr. 30, 2009).[2]

[2] The National Counterterrorism Center (NCTC) was established in 2004 by Executive Order. *See* Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Aug. 27, 2004). The NCTC was then authorized by statute. *See* 50 U.S.C. § 404o. Pursuant to the law, the NCTC serves as the U.S. Government's "knowledge bank on

In 2007, 19 U.S. citizens worldwide were reported killed as a result of incidents of terrorism, and 17 U.S. citizens were reported kidnapped. *National Counterterrorism Center: Annex [to the 2006 Country Reports on Terrorism] of Statistical Information* at 8 (2007), http://www.state.gov/s/ct/rls/crt/2007/103716.htm.

Holding aiders and abettors of terrorism liable for their conduct is one of several fronts on which the United States must fight the war against terrorism. *See* Debra M. Strauss, "*Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*," 19 Duke J. Comp. & Int'l L. 307, 310 (2009) (characterizing civil suits as a "nonmilitary approach" to compensate terror victims and also "potentially deplete the assets and financial support for future terrorist acts"). We cannot win this war unless we not only hold terrorist actors accountable, but also those who enable them to achieve their illegal goals.

III. It Would Be Illogical and Unjust to Preclude Salah's Liability Under Section 2333

The Court of Appeals for the Seventh Circuit concluded that because Respondent Muhammad Salah was imprisoned at the time that 18 U.S.C. § 2339A was enacted, he cannot be held liable under Section 2333 for having aided and abetted Hamas' terrorism that led to David Boim's murder. This conclusion is illogical and unjust.

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international terrorism." NCTC 2008 Report at 1. The NCTC acknowledges the difficulty of tracking and collecting information about terror attacks (*id.* at 1-3), but considers the tracking system it uses to be "a valuable tool for facilitating empirical research on terrorism." *Id.* at 3.

The Seventh Circuit acknowledged that there could be liability under Section 2333 for aiding and abetting terrorism, when the aiding and abetting occurred in 1995, and an American is killed abroad 50 years later, in 2045. *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 699-700 (7th Cir. 2008). According to the court, such a situation would not raise a statute of limitations problem, because the statute would not begin to run until the tort's commission, "and that would not occur until the injury on which suit was based was inflicted." *Id.* at 700. The court reasoned that "[t]errorism campaigns often last for many decades" and "[s]eed money for terrorism can sprout acts of violence long after the investment." *Id.*

While that reasoning is consistent with Congress' intention to give American victims of terrorism the full range of civil remedies to redress their injuries, it is inconsistent with the Seventh Circuit's analysis of Respondent's liability under Section 2333. Despite the integral role he played in Hamas' terrorist operations, the Seventh Circuit concluded that Salah cannot be liable for his contribution to David Boim's murder because Salah was imprisoned at the time that Section 2339A was enacted.

Salah was the admittted U.S.-based leader of Hamas' military branch. *Matter of Extradition of Marzook*, 924 F. Supp. 565, 587 (S.D.N.Y. 1996). There is evidence that he recruited and trained terrorists, channeled funds to Hamas operatives, and helped reorganize and restaff Hamas military cells in Israel. *United States v. One 1997 E35 Ford Van VIN 1FBJS31L3VHB70844*, 50 F. Supp. 2d 789,793-94 (N.D. Ill. 1999).

Section 2339A, a statute creating criminal liability, should be no obstacle to Salah's civil liability under Section 2333. Salah was a moving force behind Hamas' terrorist operations, which led to David Boim's death and continued after Salah's imprisonment. *See United States v. Cohen*, 260 F.3d 68, 77-78 (2d Cir. 2001) (defendant could be liable for aiding and abetting his company's criminal acts occurring after his arrest, where defendant was "a moving force" behind the company's operation, which continued functioning post-arrest).

Interpreting Section 2333 to preclude Salah's liability is illogical and unjust for a second reason. The Seventh Circuit's interpretation of Section 2333 left all of the defendant entities in this case subject to civil liability under the law, even though they claim that they directed their support principally to Hamas' health, educational, and other social welfare services. *See Boim*, 549 F.3d at 698. Yet the Seventh Circuit relieved Salah from liability, even though he alone among the defendants directed his support exclusively to Hamas' military and terrorist activities. *See id.*

Salah's contributions to Hamas were very useful to Hamas in carrying out its terrorist operations that led to David Boim's murder, even though Salah was incarcerated for a period of time. Enforcing Section 2333 against Salah and other aiders and abettors of terrorism will ensure that victims like the Boims will obtain the fairest measure of justice.

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioners' application for a writ of certiorari.

Respectfully submitted,

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